TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 354.

THE UTAH AND NORTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

LINNIE M. PALMER AND ALFRED MERLE PALMER, AN INFANT, BY WM. F. FISHER, HIS GUARDIAN AD LITEM.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF IDAHO.

FILED APRIL 19, 1888.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Idaho, Greeting:

Because in a record and proceedings, as also in a rendition of the judgment of a plea which is in the said supreme court, before you, between Linnie M. Palmer and Alfred Merle Palmer, an infant, by William F. Fisher, his guardian *ad litem*, plaintiffs and respondents, and The Utah and Northern Railway Company, a corporation, defendant and appellant, manifest error hath happened, to the great damage of the said Utah and Northern Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1888, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, and the seal of the supreme court of the Territory of Idaho, this 23d day of February, in the year of our Lord one thousand eight hundred and eighty-eight.

Supreme Court Seal, Idaho Territory.

A. L. RICHARDSON,
Clerk of the Supreme Court of Idaho Territory.

b [Endorsed:] Original writ of error. Filed Feb. 23d, 1888. A. L. Richardson, clerk.

c United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1888, pursuant to a writ of error filed in the clerk's office of the supreme court of Idaho Territory, wherein The Utah and Northern Railway Company, a corporation, is plaintiff in error and you, Linnie M. Palmer and Alfred Merle Palmer, by William F. Fisher, guardian *ad litem*, are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James B. Hays, chief justice of the supreme court of Idaho Territory, this 23d day of February, A. D. 1888.

JAMES B. HAYS,
Chief Justice, Idaho Ter.

TERRITORY OF IDAHO, } ss:
Ada County, }

W. H. Savidge, being duly sworn, deposes and says that he is a male citizen of the United States over the age of twenty-one years; that he is a practicing attorney-at-law in said Territory and one of the counsel of the said Utah and Northern Railway Company, the plaintiff in error in the above case: that on the 23d day of February, A. D. 1888, at the said county and Territory, he delivered a true copy of the above citation to James H. Hawley, Esq., who is one of the attorneys of record of the said defendants in error.

W. H. SAVIDGE.

Supreme Court Seal, Idaho Territory. Subscribed and sworn to before me this 23d day of February, 1888.

A. L. RICHARDSON, *Clerk.*

d [Endorsed:] Original citation. Filed Feb. 23d, 1888. A. L. Richardson, clerk.

e In the Supreme Court of Idaho Territory.

LINNIE M. PALMER and ALFRED MERLE PALMER, by W. F. FISHER, His Guardian *ad Litem*, Plaintiffs and Respondents,
vs.
THE UTAH AND NORTHERN RAILWAY COMPANY, Defendant and Appellant.

Transcript.

P. L. Williams, W. H. Savidge, attorneys for appellant; Smith & Wright, H. M. Bennett, James H. Hawley, attorneys for respondent.

Filed this 12th day of Jan., 1888.

A. L. RICHARDSON,
Clerk Supreme Court.

1 In the District Court of the Third Judicial District of Idaho Territory in and for Bingham County.

LINNIE M. PALMER and ALFRED MERLE PALMER, Heirs of William O. Palmer, Deceased, Plaintiffs,
against
THE UTAH AND NORTHERN RAILWAY COMPANY, Defendant.

Complaint.

These plaintiffs complain and for cause of action allege:

First.

That the plaintiff, Linnie M. Palmer, is the widow of William O. Palmer, deceased, and that Alfred Merle Palmer is the child of Wm. O. Palmer, deceased, and Linnie M. Palmer, and that the plaintiffs are the heirs and only heirs of William O. Palmer, deceased.

Second.

That the defendant is a corporation owning and operating a line of railway from Ogden, Utah, to Garrison, Montana; that it is organized under the laws of the United States.

Third.

2 That on the 11th day of December, 1885, the defendant was a common carrier of passengers by railroad from Ogden, Utah, to Garrison, Montana.

Fourth.

That on that day William O. Palmer was a passenger in one of the cars of the defendant on said road.

Fifth.

That while he was such passenger at near Hawgood, in Bingham county, Idaho, the said defendant, not regarding its duty in that behalf, did, by its servants and agents, so carelessly, negligently, and unskillfully conduct and operate the running of said cars and railroad that on the day and year aforesaid, by the carelessness, negligence, and default of its said agents and servants and for want of due care and attention to its duty in that behalf, the said car was thrown off the track by reason of a broken rail which the said defendant carelessly and negligently permitted to remain upon said railroad track, whereby the said William O. Palmer was killed.

Sixth.

That said killing was without any fault or negligence on the part of the said William O. Palmer.

Seventh.

That the said William O. Palmer died intestate.

Eighth.

That by reason of the acts of said defendant above complained of plaintiffs have been damaged in the sum of forty thousand dollars.

Wherefore plaintiffs pray judgment in the sum of forty thousand dollars and for their costs in this action expended, and for all such further relief as may be proper.

H. M. BENNETT AND
SMITH & WRIGHT,
Attorneys for Plaintiffs.

TERRITORY OF IDAHO, }
County of Bingham, } ss:

Linnie May Palmer, being duly sworn, says that she is one of the plaintiffs in the above-entitled action; that she has heard read
3 the foregoing complaint and knows the contents thereof; that the same is true of her own knowledge, except as to matters which are therein stated on information and belief, and as to those matters that she believes it to be true.

LINNIE MAY PALMER.

Subscribed and sworn to before me this 10th day of April, 1885.

A. F. CALDWELL,
Justice of the Peace.

Endorsed: Title of cause and court. Complaint. Filed April 12th, 1886. S. H. Hays, clerk. H. M. Bennett and Smith — Wright, attorneys for plaintiffs.

(Title of Court and Cause.)

Demurrer.

And now comes the said defendant, by the undersigned, its attorneys, and demurs to the complaint of the said plaintiffs, and for cause of demurrer says that the said complaint does not state facts sufficient to constitute a cause of action.

Wherefore the said defendant prays that the said complaint be dismissed, and that it have judgment against the said plaintiffs for its costs herein.

P. L. WILLIAMS,
HOMER STULL,
Attorneys for Defendant.

Endorsed: Title of court and cause. Demurrer to complaint. Filed April 21st, 1886. S. H. Hays, clerk. P. L. Williams and Homer Stull, attorneys for defendant.

4 The following order on demurrer was made and entered of record on Wednesday, April 28, 1886:

(Title of Cause.)

Now comes the defendant in above-entitled cause and interposes a demurrer to plaintiffs' complaint herein, and the court being advised of and concerning the said demurrer—

It is ordered that the same be, and it is hereby, sustained; and it is further ordered that the plaintiff herein be granted leave to amend original complaint; and it is further ordered that W. F. Fisher be, and he is hereby, appointed guardian *ad litem* for the plaintiff Alfred Merle Palmer.

(Title of Court and Cause.)

Amended Complaint.

The plaintiffs complain and for cause of action allege—

First.

That the plaintiff Linnie M. Palmer is the widow of William O. Palmer, deceased, and that Alfred Merle Palmer is the child of William O. Palmer, deceased, and Linnie M. Palmer, and that W. F. Fisher is the guardian *ad litem* of the plaintiff Alfred Merle Palmer, and that the plaintiffs are the heirs and only heirs of William O. Palmer, deceased.

Second.

That the defendant is a corporation owning and operating a line of railway from Ogden, Utah, to Garrison, Montana; that it is organized under the laws of the United States.

Third.

That on the 11th day of December, 1885, the defendant was a common carrier of passengers by railroad from Ogden, Utah, to Garrison, Montana.

Fourth.

That on that day William O. Palmer was a passenger in one of the cars of the defendant on said road.

5 Fifth.

That while he was such passenger at near Hawgood, in Bingham county, Idaho, the said defendant, not regarding its duty in that behalf, did, by its servants and agents, so carelessly, negligently, and unskillfully conduct and operate the running of said cars and railroad that on the day and year aforesaid, by the carelessness, negligence, and default of its said agents and servants and for want of due care and attention to its duty in that behalf, the said car was thrown off the track by reason of a broken rail which the said defendant carelessly and negligently permitted to remain upon said railroad track, whereby the said William O. Palmer was killed.

Sixth.

That said killing was without any fault or negligence on the part of the said William O. Palmer.

Seventh.

That the said William O. Palmer died intestate.

Eighth.

That by reason of the acts of said defendant above complained of plaintiffs have been damaged in the sum of forty thousand dollars.

Wherefore plaintiffs pray judgment in the sum of forty thousand dollars and for their costs in this action expended, and for all such further relief as may be proper.

H. M. BENNETT AND
SMITH & WRIGHT,
Attorneys for Plaintiffs.

TERRITORY OF IDAHO,
County of Bingham, } ss:

H. W. Smith, being duly sworn, says that he is one of the attorneys for the plaintiffs in the above-entitled action; that he has heard read the foregoing complaint and knows the contents thereof; that the same is true, of his own knowledge; that he makes this verification for the reason that the plaintiffs herein are absent from the county of Bingham, where affiant resides.

H. W. SMITH.

6 Subscribed and sworn to before me this 29th day of April, 1886.

S. H. HAYS, *Clerk,*
By WM. B. THEWS, *Deputy.*

Endorsed: Title of court and cause. Amended complaint. Service of copy of the within amended complaint hereby acknowledged this 29th day of April, 1886. P. L. Williams, H. Stull, attorneys for defendant. Filed April 29th, 1886. S. H. Hays, clerk. H. M. Bennett and Smith & Wright, attorneys for plaintiffs.

(Title of Court and Cause.)

Demurrer to Amended Complaint.

And now comes the said defendant, by the undersigned, its attorneys, and demurs to the plaintiffs' amended complaint on file herein, and assigns the following causes of demurrer, to wit:

First.

That there is a misjoinder of parties plaintiff, in that W. F. Fisher is joined with the other plaintiffs as guardian *ad litem* for the plaintiff Alfred Merle Palmer, while it does not sufficiently appear from said amended complaint that the said Alfred is an infant or insane or otherwise incompetent to sue in his own right.

Second.

That if the said Alfred Merle Palmer is a minor he has not legal capacity to sue, and said amended complaint does not state nor show that the said W. F. Fisher or any other person has been appointed his guardian.

Third.

The said amended complaint is ambiguous, unintelligible,
7 and uncertain in this, that while it shows that the said Alfred Merle Palmer sues by the said W. F. Fisher, as his guardian *ad litem*, it fails to show that the said Alfred is an infant or otherwise incapable of suing in his own right, and it also fails to show any appointment or authority of the said Fisher to act as such guardian.

Fourth.

That the said amended complaint does not state facts sufficient to constitute a cause of action.

Wherefore the defendant prays to be hence dismissed with its costs herein.

P. L. WILLIAMS,
HOMER STULL,
Attorneys for Defendant.

Endorsed: Title of court and cause. Demurrer to amended complaint. Copy received this 10th day of May, 1886, but service not accected. H. M. Bennett, Smith & Wright, plaintiffs' attorneys. Filed May 10th, 1886. S. H. Hays, clerk.

The following order on said demurrer was made on Friday, May 14th, 1886:

(Title of Cause.)

Now comes the defendant into court and interposes a demurrer to plaintiffs' amended complaint herein, and the court, being advised of and concerning the said demurrer, sustained the same; and it is further ordered that plaintiff be granted leave to file second amended complaint, which was filed instanter, and that defendant have until Wednesday, the 19th inst., in which to answer.

8 (Title of Court and Cause.)

Second Amended Complaint.

The plaintiffs complain and allege for cause of action against the defendant—

First.

That the plaintiff Linnie M. Palmer is the widow of Wm. O. Palmer, deceased, and that the plaintiff Alfred Merle Palmer is the son of Linnie M. Palmer and Wm. O. Palmer, deceased, and that these plaintiffs are the only heirs of Wm. O. Palmer, deceased.

Second.

That Alfred Merle Palmer, one of the plaintiffs herein, is an infant under the age of ten years, and that W. F. Fisher is his guardian *ad litem;* that said W. F. Fisher was duly appointed such guardian *ad litem* by the Hon. J. B. Hays, judge of this court, on the 28th day of April, 1886.

Third.

That the defendant is a corporation owning and operating a line of railway from Ogden, Utah, to Garrison, Montana; that it is organized under the laws of the United States.

Fourth.

That on the 11th day of December, 1885, the defendant was a common carrier of passengers from Ogden, Utah, to Garrison, Montana, over and along its said railroad, and that on the said 11th day of December, 1885, Wm. O. Palmer was a passenger in one of the cars of the defendant on said road.

Fifth.

That while he was such passenger at near Hawgood, in Bingham county, Idaho, the said defendant, not regarding its duty in that behalf, did, by its servants and agents, so carelessly, negligently, and unskilfully conduct and operate the running of said cars and railroad that on the day and year aforesaid, by the carelessness, negligence, and default of its said agents and servants and for want of due care and attention to its duty in that behalf, the said car in which said Wm. O. Palmer was riding was thrown off the track and overturned by reason of a broken rail which the said defendant carelessly
9 and negligently permitted to remain upon the track; that by the overturning of said car and throwing the same from the track the said Wm. O. Palmer was thrown with great violence out of said car and crushed and killed.

Sixth.

That such killing was without fault or negligence on the part of said Wm. O. Palmer.

Seventh.

That said Wm. O. Palmer died intestate.

Eighth.

That by reason of the acts of said defendant above complained of in causing the death of said Wm. O. Palmer the plaintiffs have been damaged in the sum of forty thousand dollars.

Wherefore the plaintiffs pray judgment against said defendant in the sum of forty thousand dollars and for their costs in this action expended, and for all such further relief as may be proper.

H. M. BENNETT AND
SMITH & WRIGHT,
For Plaintiffs.

TERRITORY OF IDAHO, } ss:
County of Oneida, }

H. W. Smith, being duly sworn, says that he is one of the attorneys for the plaintiffs in this action; that he knows the contents of the foregoing complaint, and that the same is true of his own knowledge except as to matters therein sated on information and belief, and as to those matters he believes it to be true; that the plaintiffs are absent from Bingham county, the county wherein their attorneys reside, and affiant therefore makes this verification in their behalf.

H. W. SMITH.

Subscribed and sworn to before me this May 14th, 1886.
S. H. HAYS, *Clerk.*

Endorsed: Title of court and cause. Amended complaint. Filed May 14th, 1886. S. H. Hays, clerk, by Wm. B. Thews, deputy clerk. H. M. Bennett and Smith & Wright, for plaintiffs.

10 (Title of Court and Cause.)

Demurrer.

And now comes the said defendant, by the undersigned, its attorneys, and demurs to the last-amended complaint of the said plaintiffs in the above-entitled action, and for cause of demurrer says that the said amended complaint does not state facts sufficient to consitute a cause of action.

Wherefore the said defendant prays to be hence dismissed with its costs herein.

P. L. WILLIAMS,
HOMER STULL,
Attorneys for Defendants.

Endorsed: Title of court and cause. Demurrer. Service of copy admitted this 19th day of May, 1886. H. M. Bennett and Smith & Wright, plaintiffs' attorneys. Filed May 19th, 1886. S. H. Hays, clerk, by Wm. B. Thews, deputy clerk.

The following order or demurrer was made and entered of record on Wednesday, May 26th, 1886.

(Title of Cause.)

Now comes the defendant and interposes a demurrer to the second amended complaint herein, and the court being advised of and concerning the same, it is hereby ordered that the said demurrer be, and the same is hereby, overruled, to which ruling counsel for defendant duly excepted.

(Title of Court and Cause.)

Answer.

And now comes the said defendant, by its attorneys, and, for answer to the last amended complaint of the said plaintiffs (and
11 not waiving the demurrer thereto), denies that at the time alleged in said amended complaint the said Wm. O. Palmer was a passenger in the said or any car of the defendant on said road, and denies that while the said Wm. O. Palmer was such passenger, as alleged, in one of defendant's cars or otherwise at the alleged or any time or place this defendant, not regarding its duty in that behalf, did, by its servants or agents or otherwise, so carelessly, negligently, or unskillfully or at all carelessly, negligently, or unskillfully conduct or operate the running of its said cars or railroad that at the said or any time by the said carelessness, negligence, or default of its said agents or servants or any of them or for want of due or any care or attention to its duty in that behalf the said car was thrown off the said track or overturned by reason of a broken rail which the said defendant carelessly or negligently or otherwise permitted to remain on the said track.

And defendant, on its information and belief, denies that by the alleged overturning of said car or throwing the same from the said track the said Palmer was thrown with great or any violence or at all out of said car or crushed or killed; and, on like information and belief, the said defendant denies that said alleged killing was without fault or negligence on the part of said Palmer.

And denies that by reason of said alleged acts of this defendant complained of in said amended complaint in causing, as therein alleged, the death of said Wm. O. Palmer the plaintiffs have been or are damaged in the sum of forty thousand dollars or any other sum whatever.

Wherefore the defendant prays to be hence dismissed with its costs.

P. L. WILLIAMS,
HOMER STULL,
Attorneys for Defendant.

TERRITORY OF UTAH, } ss:
Salt Lake County, }

P. L. Williams, being duly sworn, on his oath says that he is one of the attorneys of the said defendant herein, and makes this verification on its behalf and for the reason that all of its officers are absent from the said county where affiant resides. He further says that he has read the above and foregoing answer, and that
12 the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

P. L. WILLIAMS.

Subscribed and sworn to before me this 17th day of May, 1886.

W. VAN COTT,
[L. S.] *Notary Public.*

Endorsed: Title of court and cause. Answer. Service of copy admitted this 19th day of May, 1886. H. M. Bennett, Smith & Wright, plaintiffs' attorneys. Filed May 19th, 1886. S. H. Hays, clerk, by Wm. B. Thews, deputy.

(Title of Court and Cause.)

Verdict.

We, the jury in the above cause, find for the plaintiffs and assess their damages at 16,702.85$\frac{5}{7}$ dollars.

HENRY DUNN, *Foreman.*

Dated May 25, 1887.

Endorsed: Title of court and cause. Verdict. Filed May 25th, 1887. S. H. Hay, clerk, by F. H. Bixby, deputy.

(Title of Court and Cause.)

Judgment.

This cause having come on regularly for trial on May 23d, 1887, before the court and a jury, Smith & Wright, H. M. Bennett, and James H. Hawley appearing for the plaintiffs, and P. L. Williams and Homer Stull appearing for the defendant, and the said
13 jury having, on the 25th day of May, 1887, brought in their verdict, assessing the damage to plaintiffs at the sum of sixteen thousand seven hundred two dollars and eighty-five and $\frac{5}{7}$ cents:

Now, therefore, in consideration of the law and the premises, it is ordered and adjudged that the plaintiffs do have and recover of and from the defendant the said sum of 16,702.85$\frac{5}{7}$ dollars, together with said plaintiffs' costs and disbursements, taxed at —— dollars.

By order of the court.

S. H. HAYS, *Clerk.*

Dated May 26, 1887.

Endorsed: Title of court and cause. Judgment on verdict. Filed May 26, 1887. S. H. Hays, clerk.

On July 2nd, 1887, the defendant gave notice of motion for new trial, and on November 2nd, 1887, said motion was duly heard upon the following statement on motion for new trial:

(Title of Court and Cause.)

The plaintiffs complain and allege for cause of action against the defendant—

First.

That the plaintiff Linnie M. Palmer is the widow of William O. Palmer, deceased, and that the plaintiff Alfred Merle Palmer is the son of Linnie M. Palmer and William O. Palmer, deceased.

Second.

That Alfred Merle Palmer, one of the plaintiffs herein, is an infant under the age of ten years, and that W. F. Fisher is his guardian *ad litem;* that said W. F. Fisher was duly appointed such guardian *ad litem* by the Hon. J. B. Hays, judge of this court, on the 28th day of April, 1886.

Third.

That the defendant is a corporation owning and operating
14 a line of railway from Ogden, Utah, to Garrison, Montana; that it is organized under the laws of the United States.

Fourth.

That on the 11th day of December, 1885, the defendant was a common carrier of passengers from Ogden, Utah, to Garrison, Montana, over and along its said line of railroad, and that on the said 11th day of December, 1885, Wm. O. Palmer was a passenger in one of the cars of the defendant on said road.

Fifth.

That while he was such passenger near Hawgood, in Bingham county, Idaho, the said defendant, not regarding its duty in that behalf, did, by its servants and agents, so carelessly, negligently, and unskillfully conduct and operate the running of said cars and railroad that on the day and year aforesaid, by the carelessness and negligence and default of its said agents and servants and for want of due care and attention to its duty in that behalf, the said car in which said William O. Palmer was riding was thrown off the track and overturned by reason of a broken rail which said defendant carelessly and negligently permitted to remain on the track.

That by the overturning of said car and throwing the same from the track the said William O. Palmer was thrown with great violence out of said car and crushed and killed.

Sixth.

That such killing was without fault or negligence on the part of said William O. Palmer.

Seventh.

That said William O. Palmer died intestate.

Eighth.

That by reason of the acts of said defendant above complained of in causing the death of said William O. Palmer the plaintiffs have been damaged in the sum of forty thousand dollars.

Wherefore the plaintiffs pray judgment against said defendant in the sum of forty thousand dollars and for their costs in this action expended, and for all such further relief as may be proper.

H. M. BENNETT,
SMITH & WRIGHT,
For Plaintiffs.

(Duly verified.)

15 The foregoing is a true copy of the complaint, excepting the verification, which it is agreed was in proper form.

Answer.

And now comes the said defendant, by its attorneys, and for answer to the last-amended complaint of said plaintiffs (and not waiving the demurrer thereto) denies that at the time alleged in said complaint the said William O. Palmer was a passenger in the said or any car of the defendant on said railroad, and denies that, while said William O. Palmer was such passenger, as alleged, in one of the defendant's cars or otherwise at the alleged or at any time or place, this defendant, not regarding its duty in that behalf, did, by its servants or agents or otherwise, so carelessly, negligently, or unskillfully or at all carelessly, negligently, or unskillfully conduct or operate the running of its said cars or railroad that at the said or any time, by the said or any carelessness, negligence, or default of its said agents or servants or any of them or for want of due care or attention to its duty in that behalf, the said car was thrown off the said track or overturned by reason of a broken rail which the said defendant carelessly or negligently or otherwise permitted to remain on said track.

And defendant, on its information and belief, denies that by the alleged overturning of said car or throwing the same from said track the said Palmer was thrown with great or any violence or at

all out of said car or crushed or killed; and, on like information and belief, the said defendant denies that said alleged killing was without fault or negligence on the part of said Palmer.

And denies that by reason of said alleged acts of this defendant complained of in said amended complaint in causing, as herein alleged, the death of said William O. Palmer the plaintiffs have been or are damaged in the sum of forty thousand dollars or any other sum whatever.

Wherefore the defendant prays to be hence dismissed with its costs.

P. L. WILLIAMS,
HOMER STULL,
Attorneys for Defendant.

(Duly verified.)

16 The foregoing is a true copy of the defendant's answer, excepting the title of court and cause and the verification, which were in proper form.

(Title of Court and Cause.)

Notice of Motion to Amend Answer.

To the above-named plaintiffs and to Messrs. Smith & Wright and H. M. Bennett, their attorneys:

You are hereby notified that the above-named defendant will move the said court, at the court-house, atthe town of Blackfoot, in said county of Bingham, at the opening of said court on the first day of the next term thereof or as soon thereafter as counsel can be heard, for leave to amend its answer in the above-entitled case by substituting for said answer and filing the proposed amended answer, a copy of which is herewith served.

The said motion will be made and based upon the files and records in said case, upon the proposed amended answer, duly verified, and the affidavit of P. L. Williams, a copy of which is herewith served.

P. L. WILLIAMS,
HOMER STULL,
Attorneys for Defendant.

Dated April 19th, 1887.

The above is a true copy of notice served on Messrs. Smith & Wright, of counsel for plaintiffs, at Blackfoot, Bingham county, Idaho, April 21st, 1887.

(Title of Court and Cause.)

Affidavit of P. L. Williams.

P. L. Williams, being duly sworn, on his oath deposes and says that he is one of the attorneys of the defendant in the above-entitled action, and prepared the pleading therein on the part of said defendant.

17 That he is now informed, advised, and believes that the proposed amended answer herewith presented correctly shows the actual relationship of the deceased William O. Palmer to the said corporation, the Union Pacific Railway Company, at and prior to the time of his death, and also the true relationship of the last-named company to said Utah and Northern railroad, mentioned in said amended complaint; that affiant had not been advised of the said matters at the time of preparing the original answer herein; that this application to amend the defendant's said answer is not made for the purpose of delay, but in good faith and that justice may be done.

P. L. WILLIAMS.

Excepting jurat and attestation of officer administering oath, the above is a true copy of the affidavit served on Smith & Wright, with the foregoing notice of motion for leave to amend.

(Title of Court and Cause.)

Proposed Amended Answer.

And now comes the said defendant, by its attorneys, and by leave of the court files this its amended answer to the last amended complaint of said plaintiffs (and not waiving the demurrer thereto); denies that the said defendant is or was at the time of filing said complaint or at any of the times mentioned therein operating the said line of railway, or that it was at any of said times a common or other carrier of passengers between the said or any places over or along its said line of railroad or otherwise, and denies that at the time alleged in said complaint the said William O. Palmer was a passenger in the said or any car of the defendant or at all on said railroad.

Denies that while the said William O. Palmer was such passenger, as alleged or otherwise, at the alleged or any time or place, this defendant, not regarding its duty in that behalf, did, by its servants or agents or otherwise, so carelessly, negligently, unskillfully, or at all carelessly, negligently, or unskillfully conduct or operate the *the* running of its said cars or railroad that at the said or any time by the said or any carelessness, negligence, or de-
18 fault of its said agents or servants, or for want of due or any care or attention to its duty in that behalf, the said car was thrown off the said track or overturned by reason of the said or any broken rail which said defendant carelessly or negligently or otherwise permitted to remain on the said track.

And defendant, upon its information and belief, denies that by the alleged overturning of the said car or throwing the same from the said track the said Palmer was thrown with great or any violence or at all out of said car or crushed or killed; and on like information and belief the said defendant denies that the said alleged killing was without fault or negligence on the part of said Palmer.

And defendant denies that by reason of said alleged acts of this defendant, complained of in said complaint, in causing, as therein alleged, the death of the said William O. Palmer, the plaintiffs have been damaged in the sum of forty thousand dollars or any part thereof.

Further answering the said complaint, the defendant alleges that for some time prior to and at the time of the death of the said Palmer and ever since that the Union Pacific Railway Company, a corporation created and existing under the laws of the United States, was in the sole and exclusive possession and control of the railroad mentioned and described in said complaint, and was at all said times keeping in repair, running, and operating the same.

That the said train of cars on which the said Will. O. Palmer was riding at the time of his death was then being run and operated by the said Union Pacific Railway Company, and each and every of the servants and employés then engaged upon the said train and elsewhere upon the said railroad was the servant and employé of the last-named company.

That the said William O. Palmer was a carpenter by trade, and was at the time of his death and for a long time prior thereto he had been an employé of the said Union Pacific Railway Company, engaged in bridge building and repairing and other like work on the said railroad mentioned in said complaint.

That the said William O. Palmer was employed to work and did work in the said employment, in connection with several other workmen engaged in the same business, under the direction of a bridge foreman, who were collectively known as and called the "bridge gang."

19 That by his contract of service as aforesaid with and for the said Union Pacific Railway Company the said William O. Palmer was to receive a certain price, to wit, the sum of two dollars and eighty-five cents per day, and was also to be transported, in connection with his said fellow-workmen of said "bridge gang," and subject to the conditions hereinafter stated, free of charge by the said railway company from one point to another on the line of the said railroad mentioned in said complaint, as the business of said company in which he was engaged should from time to time require.

That in pursuance of the terms of said contract and to enable him, the said Palmer, and the said other employés in the said "bridge gang" to be transported free of charge the said Union Pacific Railway Company issued an employé's time pass, in the name of the "foreman" of said "gang," authorizing the transportation as aforesaid of the said "bridge gang," including the said Palmer; that the said pass so issued contained and had endorsed thereon a condition to the effect that the person accepting the same should assume all risks of accidents and expressly agree that the said Union Pacific Railway Company should not be liable under any circumstances, whether of negligence by its agents or otherwise, for any injury to his person; and the defendant avers that the said condition upon said pass was a reasonable and lawful regulation and con-

dition and was binding upon the person or persons accepting the same; that at the time of the accident which caused the death of the said William O. Palmer he was such a servant and employé of the said Union Pacific Railway Company as aforesaid, and not as a passenger, traveling upon its said railway train upon its said business in pursuance of his said contract with said company and upon the said pass; that he then and there had the said pass upon his person, and at the time and long prior thereto he had full knowledge and information of said condition upon said pass and was then and there bound by the same.

Wherefore the said defendant prays to be hence dismissed with its costs herein.

P. L. WILLIAMS,
HOMER STULL,
Attorneys for Defendant.

(Duly verified.)

The foregoing copy of a form of amended answer is a true copy of a proposed amended answer of defendant herein, a copy of which was served on Messrs. Smith & Wright, at Blackfoot, Idaho, April 21st, 1887, together with copies of the notice of motion for leave to amend, &c., which are hereinbefore set out.

The said motion to amend the defendant's answer herein, as above shown, was argued by counsel of the respective parties herein on Monday, May second, A. D. 1887, and submitted and taken under advisement by the court, and subsequently the said court overruled said motion and refused to allow the said proposed amendment; to which ruling of the court the defendant then and there excepted.

This cause came regularly on to be heard on the 23d day of May, 1887, Messrs. Smith, Hawley and Bennett appearing as attorneys for the plaintiffs and P. L. Williams, Esq., and Homer Stull, Esq., appearing for the defendants, and a jury having been duly empanelled and sworn, the following proceedings were had:

S. F. TAYLOR, being duly sworn on behalf of the plaintiffs, testified as follows:

Q. What is your name?
A. S. F. Taylor.
Q. Where were you on the night of the 10th of December, 1885?
A. Well, I don't remember dates. It was the night before the wreck happened. I was on the passenger train going north to Camas.
Q. Do you remember the occasion of Mr. Palmer——
A. (Interrupting.) I was acquainted with the gentleman previous to that wreck. That was the night I am speaking of going north.
Q. At about what time did you reach Market Lake station?
A. I do not remember.
Q. Was it in the night time?
A. In the night time.

Q. Near midnight?

A. I think so. My recollection is the train was a little late going north, but I do not know just what time.

21 Q. Do you know where Hawgood station is, with relation to Market Lake?

A. I do.

Q. Where is it?

A. I don't know just how many miles it is. It is the station between Market Lake and Camas, but I do not just know the distance either way.

Q. Did you notice anything unusual in the car that night between Market Lake and Hawgood?

A. Yes, sir.

Q. At about what point was it from Hawgood?

A. Well, I could not state that either, because I didn't pay any attention.

Q. Well, what happened?

A. Well, I noticed a sudden jerk of the train. I spoke about it at the time. It seemed like a broken rail or something of that sort.

Q. What was the nature of the jerk—was it a lurch of the car?

A. Yes, sir.

Q. Appeared that the wheel had passed over some obstruction on the track?

A. That is what it seemed like to me.

Q. What is the distance between Market Lake and Camas?

A. I think it is about twenty miles.

Q. This lurch you noticed before you got to Hawgood station?

A. I think it was. I know it was. In fact, shortly after we left Market Lake. I don't know just how far. I wasn't paying much attention to it at the time nor to the distance.

No cross-examination.

TIM. FARRELL, sworn for the plaintiff, testified as follows:

Q. What is your name?

A. Timothy Farrell.

Q. What is your business?

A. Railroad conductor.

22 Q. Do you remember the occasion of the wreck in which Palmer was killed, in December, 1885?

A. I remember that; yes.

Q. Where were you on the night previous?

A. Why, I was on the road.

Q. Between what points?

WILLIAMS (interrupting): It is the same night.

SMITH: Well, the same night. I mean previous to the time he was killed. On the night of the 10 of December, where were you then?

A. I was in Eagle Rock on the 10th.

Q. Did you go out that night?

A. I went out; yes.

Q. What time did you leave Eagle Rock?
A. 12.15.
Q. On what train?
A. Train 601.
Q. Was that a passenger train?
A. Yes, sir.
Q. Did you notice anything unusual between Market Lake and Hawgood that night?
A. Yes; I noticed a little something.
Q. What was it?
A. Well, I noticed a bad joint.
Q. Just describe it to the jury.
A. Well, as we were going on between Market Lake and Hawgood we struck a bad joint, and I took notice of it and made a report of it.
Q. What was your report?
A. Well, I reported that there was a bad place about five miles east of Hawgood.
Q. What do you mean by the term "east of Hawgood" on that line?
A. Everything is east and west as regards railroading.
Q. Wasn't it more likely north and south?
A. It would mean south according to the——
Q. (Interrupting.) What your report would mean, then, to be explicit, would be bad place south of Hawgood?
A. Yes, sir.
23 Q. About half way between Market Lake and Hawgood?
A. Nearly.
Q. Have you that report now?
A. No, sir.
Q. It was a written report you made?
A. Yes, sir.
Q. To the operator at Camas?
A. It was to the dispatcher.
Q. To whom did you deliver it?
A. I delivered it to the operator—that is, I left it on the operator's table.
Q. At Camas station?
A. Yes, sir.
Q. Where—what is the south-bound passenger train called?
A. No. 602.
Q. Where did you meet that train that night?
A. Well, I am not positive where I met it.
Q. Well, about where?
A. I met it between Camas and Beaver cañon somewheres.
Q. What is your recollection as to that?
A. I could not state exactly.
Q. What is the next station?
A. Dry Creek.
Q. How far is that from Camas?
A. About 12 miles.
Q. What is the next after that?

A. High Bridge.
Q. How far is that from Dry Creek?
A. Something over eight miles.
Q. Then that would be twenty miles from Camas. Where is the next?
A. China Point.
Q. How far is that?
A. About 23 miles from Camas.
Q. Where was the regular meeting place of 601 and 602 at that time?
A. Generally at Beaver cañon.
Q. You were a little late——
A. (Interrupting.) Yes, sir.
24 Q. Consequently you are not quite certain as to where you met?
A. No, sir; I could not say.
Q. Do you know where this written report of yours is now? Have you ever seen it since you left it at the station?
A. Yes, sir.
Q. Where is it?
A. Well, it is somewhere around Blackfoot, I guess.
Q. Have you got it?
A. No, sir.
Q. Who has, if you know?
A. I saw Mr. Williams in possession of it to-day.

Mr. WILLIAMS: I have the paper here. (Hands paper to plaintiffs' attorney.)

Mr. SMITH: I ask you to look at this particular portion of that slip and state if this is the report that you made.
A. Yes, sir.
Q. What are those initials at the top—E. O. M.?
A. They are the initials of the dispatcher at——
Q. (Interrupting.) The word "Farrell," at the bottom—is that your signature?
A. Yes, sir.

Mr. SMITH: If the court please, we offer this in evidence.

WILLIAMS: You recognize that as your signature?
WITNESS: Yes, sir.

Mr. WILLIAMS: We have no objections.
SMITH: There is something written on there by some one else, I expect, that ought to be taken off.

Q. Did you put those figures in ink?
A. No, sir.
WILLIAMS: It is just the matter, including your signature, in the report?
WITNESS: Yes, sir.

Report received in evidence, marked Exhibit "1," and is in the following form, viz:

"E. O. M.:

Bad place in track about 5 miles east of Hawgood.

FARRELL."

25 Q. Mr. Farrell, have you a copy of the rules that were in force with that company at that time?

A. Well, I have none in my possession.

Q. Well, I will ask you generally how you came to make this report. Why did you make this report and deliver — to the operator? Is that in accordance with your instructions?

A. Well, our instructions are if we find anything serious, why, we can stop and leave a man, but if there is anything we don't deem a great deal of importance, and especially in cold weather, why, we always consider it a duty, as a matter of caution, to make those reports.

Q. You consider it a matter of caution to make those reports?

A. Yes, sir.

Q. Where were those reports usually delivered?

A. Why, we delivered them to the first telegraph station, and they notified the train-dispatcher.

Q. I understand, then, Hawgood is not a telegraph station?

A. No, sir.

Q. Camas is the first?

A. Yes, sir.

Q. For what purpose are they delivered to the train dispatcher or sent to the train-dispatcher?

A. Well, they send them, and they can use their own discretion as regards them. We never——

Q. (Interrupting.) Your duty is discharged when you deliver the dispatch to the operator?

A. It is, provided there is nothing serious.

Q. How is it governed in occasions of that kind? Your duty is discharged when you deliver the dispatch to the operator?

No answer.

Q. What is the course the operator pursues when he receives that dispatch?

Mr. WILLIAMS: If you know what the instructions are.

A. Notifies the train-dispatcher.

Q. What does he do?

A. Well, he generally notifies the trains for to be a little careful passing there.

Q. Notifies the trains of the bad place, so that they can be on the lookout before it reaches the spot?

A. Yes.

26 Cross-examination:

Q. You didn't see the conductor on the down train that night, even supposing you did meet him?

A. Well, I might have seen him, but I didn't speak to him; didn't have any conversation with him as I remember of.

Q. Don't remember whether you saw him or not?
A. I saw him. I was bound to see him.
Q. You say you left Eagle Rock that night at 12.15?
A. Yes, sir.
Q. Quarter past twelve in the morning of the 11th of December?
A. Yes, sir.
Q. Do you remember the time when you arrived at Camas?
A. No; I do not.

Mr. Smith, of counsel for plaintiffs, reads report to the jury.

Mr. DENNIS MAHONEY sworn for plaintiffs:

Q. What was your business on the 11th day of December, 1885?
A. Engineer.
Q. What engine were you running at that time?
A. Engine 95.
Q. What train were you pulling?
A. Well, I don't recollect now.
Q. Was it a freight or passenger train?
A. Freight train.
Q. Where were you about three o'clock that morning—the morning of the 11th of December?
A. I was at Camas.
Q. Were you at Camas when 601 went north?
A. Yes, sir.
Q. Did you see Mr. Farrell?
A. Yes, sir.
Q. Did you have any conversation with him in relation to the track south of Hawgood?
A. Yes, sir.
Q. What was it?
27 A. He told me to look out for bad place about five miles east of Hawgood.
Q. Was that all the conversation, as far as you remember?
A. That was all the conversation, so far as I remember.
Q. How long did you leave Camas after the passenger?
A. Well, I could not be sure; maybe something like an hour and a half; probably more than an hour and a half.
Q. Did you leave Camas ahead or behind 602?
A. Behind 602.
Q. You followed that train south?
A. Yes, sir.
Q. Who was the conductor on 602?
A. I think Mr. Flanders was conductor on 602.
Q. Did you receive any orders from the dispatcher's office in regard to this bad place?
A. Yes, sir.
Q. Have you got that order in your possession?
A. No, sir.
Q. Do you know where it is?

A. No, sir. I looked for it all through the house, but didn't find it.

Q. What was it, as near as you can remember?

A. The order read: "Look out for bad place four or five miles east of Hawgood."

Q. By whom was it signed—do you know?

A. I don't know. I think it was signed by Mr. ——. I think it is his signature.

Q. E. L. W.?

A. Yes, sir.

Q. Where were Mr. ——'s headquarters then?

A. Pocatello.

Q. When did you get this order?

A. Well, I don't exactly remember the time I got the order. I got the order at Camas, but I don't remember the hour or the day. I never paid much attention to it.

Q. Did you read the order you got before or after the passenger train came in?

A. I don't remember that even, whether it was before or after; it has been so long, and I paid but very little attention.

28 Q. Have kept no record?

No answer.

Q. What position did Mr. —— hold at that time?

A. He held the position of train-dispatcher.

Q. At Pocatello?

A. Yes, sir.

Q. Had charge of the trains coming in at that point?

A. Yes; there was two dispatchers; one at one time and one at another. He used to be on the latter part of the night, I think it was, and the fore part of the day—was his time to go on.

Q. What did you do after you received the order?

A. I rested within about two or three miles east of Hawgood and proceeded slow until I met a flag. I met the flag about three-quarters of a mile west of the wreck.

Q. You found a wreck there on the track?

A. Yes, sir.

Q. Immediately after you had left the flag? At the time you met the flag there what point was that with relation to Hawgood?

A. I should think it was probably four miles east of Hawgood where I met the flag.

Q. Where was the wreck?

A. The wreck was, I should judge, between four and five miles east of Hawgood.

Q. Between four and five miles east of Hawgood.

No answer.

Cross-examination:

Q. What time on that night, Mr. Mahoney, did you arrive at Camas, if you remember?

A. I think—I don't exactly remember, but I think it was about two o'clock—between half past one and two.

Q. You side-tracked your train there, did you, for 601, north bound or west bound, to pass you?

A. Yes, sir.

Q. Yours was a regular train, was it, at that time?

A. I don't recollect whether it was or not; I think it was. I got an idea the regular train was 614, but I am not certain.

Q. And you had orders to lie there, did you, that induced you to stay so long.

29 A. We could not pass there without orders.

Q. Then you had to have orders to proceed, didn't you?

A. We didn't get none until 601 arrived; but that never got there until 602 passed.

Q. Then 602 had overtaken and passed you before you got the orders?

A. Yes, sir.

Q. The orders came from the train-dispatcher's office, did they?

A. Yes, sir.

Q. Where did you see Mr. Farrell as he went up?

A. I saw him in the office at Camas when he went up.

Q. You was in the office before he came in?

A. I was in the office before he came in; yes, sir.

Q. Who spoke about the bad place first? Did he call your attention to it, or did you observe his report?

A. He called my attention to it first.

Q. Before he made out his report did he mention that to you?

A. Yes, sir.

Q. You heard the report read here just now, did you?

A. Yes, sir.

Q. That is about what he said to you?

A. Yes, sir; about what he said to me.

Q. When you received orders at Camas were they in the shape of a telegram or dispatch?

A. Something like a telegram; yes, sir.

Q. Were the orders delivered to you?

A. Delivered to me.

Q. And then you took them with you, did you?

A. Yes, sir.

Q. Well, now, what is the rule—what was it then—to deliver those orders to the conductor or the engineer?

A. It should be delivered to the conductor and engineer both. Sometimes we get only one order, and the conductor reads it and then hands it to the engineer, and he proceeds according to that order.

Q. Is there any rule with reference to the observance of those orders that you receive?

—. ——.

30 Q. Now, what was that report—this report from the train-master in reference to this bad place—as nearly as you can remember?

A. The report, as near as I can remember, was to look out for bad place four or five miles east of Hawgood.

Q. You think that the report from the dispatcher's office said four or five miles?

A. I think that is what it said in my order.

Q. Mr. Farrell's caution to you was bad place about five miles, but the dispatcher gave it a little more general and says to be cautious; to be on your guard?

A. Yes, sir.

Q. Was that report from the train-master on the same paper in which you had your orders to proceed?

A. No, sir.

Q. In a different paper?

A. Different papers altogether.

Q. It is a message?

A. No, sir; an order.

Q. That is a message and the other is called an order?

A. Yes, sir.

Q. Both are dispatches, really?

A. Yes.

Q. How long was it after you received that message with reference to the bad place before you started out?

A. Well, I don't recollect now how long it was.

Q. Which did you receive first, your order to proceed or the message with reference to that bad place?

A. I think I received them both at the same time.

Q. At the time you received those had Mr. Flanders passed you and gone on—received the running orders?

A. Yes, sir; I think that he had. I don't think—they didn't hardly ever give us the order until after the passenger train passes.

Q. Did you get your order to proceed before you received this message?

A. I think I received them both at the same time.

Q. You were a witness on the previous trial of this case?

A. Yes, sir.

31 Q. Did you on that trial testify to having received this message?

A. Yes, sir. I don't remember——

SMITH (interrupting): It is here in your statement.

Q. Do you remember what time it was when you left Camas on that morning?

A. I do not.

Q. About how long was it after 602—Mr. Flanders' train—pulled out before you left?

A. Probably it might have been 15 or 20 minutes.

Q. You say this telegram was signed by the dispatcher's initials—E. L. W. That is your remembrance?

A. Yes, sir.

Q. Did you testify on the previous trial that this dispatch said four or five miles, or five miles? Do you remember that?

A. I do not remember that.

Q. Your remembrance now is that it used both terms—"four or five"?

A. Yes; four or five.

O. A. FLANDERS sworn for the plaintiff:

Q. What is your business, Mr. Flanders?
A. Railway conductor.
Q. Were you conductor on the morning of the 11th of December, 1885?
A. Yes, sir.
Q. What train were you running that morning?
A. Train 602.
Q. Between what points?
A. Between Butte and Eagle Rock.
Q. What direction were you proceeding?
A. Going east.
Q. Upon that road what is the general direction?
A. North and south.
Q. What direction were you proceeding?
A. South.

Q. What time did you arrive at Camas on that morning?
32 A. I do not recollect exactly. We were 8 or 10 minutes late. I think we arrived there about—between—3.48, I think. I could not state positively.
Q. 3.48 in the morning?
A. 3.48 in the morning.
Q. Were you in the telegraph office at that time—that morning?
A. Yes, sir.
Q. Did you notice any message there that attracted your attention?
A. I noticed a message there; yes, sir.
Q. I ask you to look at that, Mr. Flanders, and state if you think that that is the message you saw that morning.
A. Well, what I saw of the message this is similar to it. I didn't read only a portion of the message.
Q. What was that portion that you read?
A. Bad place in track to look out for. I think those were the words.
Q. Those were the words that you observed?
A. Yes, sir.
Q. Did you make any remark about that at the time?
A. As I left the office the operator went out ahead of me, and I says to him, What about this bad place in the track? and he says, I know nothing about it. That was all that was said.
Q. Where was this message when you saw it?
A. Hanging on the hook with the other messages.
Q. Did you know William O. Palmer?
A. I wasn't personally acquainted with him.
Q. Did you know him by sight?
A. Yes, sir.
Q. Did you see him that morning?
A. I did.
Q. Was he on your train?
A. He was.

Q. Where did he get on?
A. Got on at Camas.
Q. Who was the operator at Camas at that time?
A. I don't recollect his name now; he hadn't been there very long.
33 Q. Was his name Sherman?
A. That is the name, I think.
Q. How long did he remain there after this wreck of this morning of the 11th of December?
A. I could not say. He was there after that. I saw him there and saw him at Dry Creek also, before he came.
Q. How long did you see him after the wreck, Mr. Flanders?
A. Oh, perhaps it might have been a week—possibly a week afterwards.
Q. Do you know where he is now?
A. I do not.
Q. He is not out there at this station, is he?
A. No, sir.
Q. Is he anywhere on the line, so far as you know?
A. Not that I know of.
Q. Did anything unusual happen after you passed south from Camas?
A. Well, yes, there was.
Q. At what point?
A. At a point about four miles and a half east of Hawgood—south, rather—south of Hawgood.
Q. What happened there, Mr. Flanders? Detail to the jury in your own way just what occurred.
A. The first knowledge that I had of anything wrong, the car that I was in jumped the track, and the next instant we was in the ditch, with one or two jumps on the ties, I should judge.
Q. Well, what did you do after your car had gone off in the ditch?
A. Well, I sent a flagman back, and then passed through the train to see that the fires was all right; and after I was satisfied there was no fires I went through and looked after my passengers; after I went through the train I passed around the train and found Mr. Palmer.
Q. Where did you find him?
A. In the—I think he was in the first-class coach.
Q. In what position did you find him?
A. If I recollect right, he was lying with about half his body under the coach (the coach wasn't resting on him); I think his head was toward the track.
34 Q. Was he dead or alive?
A. He was dead, from all appearances.
Q. How many cars were there in the ditch?
A. There were four.
Q. What ones were they?
A. Baggage car, smoker, first-class coach, and the sleeper.
Q. How many persons were killed?

A. One.
Q. That was Mr. Palmer?
A. Yes, sir.
Q. Any others wounded?
A. There was four or five slightly wounded.
Q. How many cars remained on the track?
A. There was the mail car and special car that we had on.
Q. The mail car was next to the engine, was it?
A. That went over.
Q. The mail car didn't go off—that is, went over the break?
A. Yes, sir.
Q. And the engine went over the break?
A. Yes, sir.
Q. The special car was the back car of all?
A. Well, that went over the break some distance, I think.
Q. The special car went over before it stopped?
A. Yes, sir.
Q. What was—what caused that wreck?
A. A broken rail.
Q. Just describe to the jury how it was broken.
A. Well, I didn't pay particular attention to the rail; I had too much other duties to attend to.
Q. You simply know there was a rail broken?
A. Yes, sir.
Q. You saw that rail replaced, did you?
A. Well, they fixed the break up while I was attending to my duties in the special car and counting the mail and baggage.
Q. You say Mr. Palmer got on with you at Camas?
A. Yes, sir.
Q. How long before the wreck was it that you saw him last?
A. Well, I think it was but a very short time before that I
35 passed through the car that he was in. I didn't take particular notice of him.
Q. Were you behind time; I believe you stated you were behind time at Camas?
A. We were perhaps 20 minutes behind there; I should judge 20 minutes late leaving; we took coal there.
Q. At what rate of speed were you running, Mr. Flanders, at the point of the wreck?
A. We might have been running 17 miles an hour; possibly faster.
Q. Were you running about regular schedule time?
A. I don't think we was running schedule time.
Q. What was your schedule time?
A. About 18 miles an hour.
Q. You were trying to make up time?
A. Yes.
Q. Why were you not running——
A. (Interrupting.) This point of the road was up grade and our engine had come from Butte without water and we didn't have far to—we had just approached from the up grade—slight up grade.

Q. You were running on down grade——
A. (Interrupting.) We had just started on the down grade.
Q. How far over the same?
A. Well, it was only a short distance; perhaps it might have been five telegraph poles.
Q. Say a thousand feet?
A. Something like that.
Q. Did you receive any notice, Mr.—or did you receive that morning any notice to look out for that place——
A. (Interrupting.) No, sir.
Q. —from the dispatcher's office, or the operator, or any one else?
—. ——.
Q. Had no such notice from Mr. Farrell?
A. No, sir.

Cross-examination:

Q. You say it was about 3.48, as near as you can remember?
A. Yes, sir.
Q. You got there about 20 minutes late, you think?
36 A. Well, I should judge about 20 minutes late.
Q. About how long were you there?
A. I should think we were there about 10 or 12 minutes; we usually was there that time at that station taking coal.
Q. Was there anything else you had to do there beside taking coal; take any passengers there or freight or baggage?
A. I think I had five passengers that got on that morning at Camas.
Q. Did you have any baggage?
A. Yes, sir.
Q. Who, if any person, was with Mr. Palmer?
A. There was two employés with him; I didn't know the men; I knew them by sight.
Q. Were they all traveling as one party, if you know about that?
A. Yes, sir.
Q. All together?
A. Yes, sir.
Q. Did you know what those men, all of them, were engaged in?
A. They were bridge carpenters.
Q. You knew them as such?
A. Yes, sir.
Q. Knew them by sight?
A. Yes, sir.
Q. Knew what they were engaged in?
A. Yes, sir.
Q. Where was your regular place of meeting at that time of trains 601 and 602?
A. Beaver cañon.
Q. Where did you meet on that morning, if you remember?
A. If I remember right, we met at High Bridge.
Q. That would be about how far east of Beaver cañon?

A. About eight miles.
Q. About how far west of Camas?
A. Well, it is about twenty miles; a little over.
Q. Remember seeing Mr. Farrell, conductor on the north or west bound train, when you passed?
37 A. I think I saw him on the platform, if I remember right. The train didn't stop.
Q. Do you know Dennis Mahoney, engineer?
A. Yes, sir.
Q. Did you know him at that time?
A. Yes, sir.
Q. Did you see him at Camas?
A. I do not recollect seeing him.
Q. Had no conversation with him that you remember of?
A. No, sir.
Q. You say the operator's name was Sherman?
A. I think so. I think Sherman was operator at that time. I think that was his name.
Q. State whether or not he was also agent of the company at that time.
A. I think he was night operator.
Q. Was there an agent also at that time?
A. Yes, sir.
Q. Who was agent?
A. I could not say who was the agent at that time. We changed several times.
Q. Who was the engineer that was driving your engine that night?
A. Russell.
Q. You think you were running scarcely schedule time?
A. I don't think we were exceeding schedule time. I don't think we were making schedule time.
Q. About 18 miles an hour?
A. Seventeen or eighteen; might have been running eighteen miles an hour.
Q. In which car were you at the time you observed you were off the track?
A. I was in the smoking car.
Q. That is the second car ahead of the sleeper?
A. Yes, sir.
Q. The one next to the baggage car is the mail car. Then there is the mail car, baggage, smoker, first-class coach, and sleeper, and on this occasion you had a special car?
A. Yes, sir.
38 Q. How long were you detained at the place of the wreck?
A. I don't recollect. We got away from there in pretty good time; perhaps 40 minutes, perhaps not as long, and it might have been a little longer.
Q. What were you giving attention to yourself during that time?
A. Looking out for my train. I knew there was a freight train

following me. I then looked out for the fires, and then looked out for my passengers.

Q. Who was it you sent with the flag—one of your brakemen?

A. No; I could not find my brakeman. I found one of those men that was with Mr. Palmer and knew he was an employé and got him to go back and flag the train.

Q. Do you remember which one it was? Do you know which one it was?

A. I don't know. It was one of those men with Mr. Palmer.

Q. And you asked him to go, knowing he was in the employment of the road?

A. Yes, sir.

Q. And after you had done that you looked after your passengers?

A. I looked after my fires first.

Q. Then your passengers?

A. Yes, sir.

Q. Then what were you engaged in the rest of the time?

A. Well, after I found Mr. Palmer we took him out from under the coach. We then transferred our passengers into the special car and then transferred our express and baggage into the mail car. Mr. Palmer remained in the mail car.

Q. You say you did not render any assistance personally in fixing the track and getting the special car over?

A. No, sir; I helped shove the special car over by hand. We shoved it over by hand.

Q. And you say that you think the special car had passed beyond the point of the break?

A. It went over the first break.

Q. And that you thought that the rails were torn loose?

A. Some of them; yes, sir.

39 Q. Torn up on account of the cars going off the track?

A. Yes, sir.

Q. Do you remember what time it was when you arrived at Market Lake?

A. I think it was about—I know I looked at my watch, as the engineer whistled for Market Lake, for reference, but now could not say.

Q. What time did you arrive at Eagle Rock?

A. I could not say as to that.

Q. Have you ever observed the point where that wreck occurred since?

A. Yes, sir.

Q. At different times?

A. Yes, sir.

Q. You would have no difficulty in determining the place?

A. None whatever.

Q. Do you know what mile-post it is nearest on the road?

A. It is nearest mile-post 227.

Q. Is it east or west or north or south, observing the points of the compass?

A. South.

Q. About how far south of the mile-post?

A. Well, it is not over half a mile.

Q. You were familiar with the road at that time, were you?

A. Yes, sir.

Q. How long had you been running on that portion of the road at that time?

A. I had been running over that portion of the road two years.

Q. All the time on a passenger train?

A. No, sir; I run on a freight train.

Q. Then you have passed over it in the day-time, have you, as well as the night time?

A. Yes, sir.

Q. You say that what you observed of the message in the office at the time was like this (showing witness message)?

A. Somewhat like this.

Q. You noticed about those words, "Bad place in track"?

A. Yes, sir.

40 Q. You say——

A. (Interrupting.) I would like to state my reason here for not reading all the message.

Mr. WILLIAMS: I was going to ask you that. You may state why it was.

A. When I arrived at Camas and went in the office and first registered—after I registered I asked the operator if the baggage that was on the platform was going south or east, and he said it was. I then went into the office and set my lamp on the operator's table, and sat on the table myself, talking with him while he was putting in his mail, and as I heard the train leaving the coal bin I turned around and took up my lamp and observed this message on the hook, and I read the first part of it, and then the train was approaching close to the platform, so I hurried off to stop the baggage car opposite this baggage, and as I came back I asked the operator what about that that I had read in the message. That is the reason I didn't read it all then.

Q. His reply—what was that?

A. He didn't know anything about it.

Q. You say that dispatch was hanging on a hook?

A. Yes, sir.

Q. Were you in the habit of going to that hook for dispatches or not?

A. No; I wasn't in the habit of going there to get them—these dispatches at a registering station—for the operator gives notice.

Q. You say the train at that time was requiring your attention; that is why you left immediately?

A. Yes, sir.

Q. And the operator, you say, knew nothing about it?

A. Yes, sir.

Q. Do you remember whether there was more than one line that you noticed on the message—whether there was more than what you read?

A. I could not be positive.

Q. That is all you remember?
A. Yes, sir.
Q. You think those are the same words?
A. I think those are the same words at the top line.

41 Dr. J. H. BEAN sworn for the plaintiffs:

Q. What is your business?
A. I am a physician.
Q. Where are you located—where were you located in December, 1885?
A. Eagle Rock.
Q. Did you know William O. Palmer?
A. No, sir; I did not.
Q. Do you recollect the wreck of December 11th, 1885?
A. Yes, sir.
Q. Do you remember to have seen the corpse of Mr. Palmer in Eagle Rock on that day?
A. Yes; I do.
Q. Where did you see him?
A. I saw his body in the depot at Eagle Rock.
Q. At Eagle Rock, after the passenger train came in from the north?
A. I was busy on the coach fixing up the wounds.
Q. Fixing up the injuries?
A. Yes, sir.
Q. Did you examine the injuries upon the body of Mr. Palmer?
A. I did.
Q. You can state, Doctor, what caused his death. What was the nature of the injuries?
A. Fracture of both arms, fracture of the ribs and breast-bone, fracture of the left wrist, and there were some other bad cuts on the face and head.
Q. After he received those injuries, Doctor, how long did he live?
A. I don't think he lived longer—I think he was killed when he fell to the ground, and the car fell on him.
Q. Death was instantaneous?
A. Instantaneous death is one of the rarest things on the earth. He would live as long as a minute.
Q. Would you call instantaneous death a minute?
A. He could not live very long.

42 Q. Doctor, in the course of your business have you had occasion to examine the question of longevity in persons of different ages?

A. Yes, sir.
Q. About what is the probable length of life of a person 24 years old, good health—male person—good habits?
A. What is the question?
Q. About what is the probable length or expectancy of life of a person 24 years old, good health and good habits—male person?
A. 24 years old?

Q. Yes, sir. Have you any memorandum or any data from which you can refresh your memory?

A. According to all the authorities I have ever seen I believe it is about between 34 and 37 years.

Q. Between 34 and 37 years?

A. Yes, sir.

Cross-examination:

Q. Is the expectancy of life from those authorities upon that subject, Doctor, the same in males as in females?

A. There are a few years in favor of the females.

Q. In favor of which sex?

A. In favor of the female, provided she goes beyond the age of child-bearing.

Q. Child-bearing—when they have passed that the probabilities are they will live to a good old age?

A. Yes, sir.

Q. I understand you to say that at the age of 24 a man of good health and habits, his expectancy of life, according to the authorities, would be from 34 to 37 years additional?

A. I believe that is about the number, Mr. Williams.

Q. What authorities do you refer to on the subject?

A. I refer to the Carlisle table.

Q. Any other?

A. Yes, sir.

Q. What others?

A. I believe there is a table called the Northampton table; there is the Equitable table—there is two in that class; there is one
43 called 17 Official tables, one called the Institute of Actuaries table, and one called the English table.

Q. Do they generally agree?

A. Yes, sir. If I may be permitted I will read one.

Q. You may read.

A. This table is on the expectancy of life or for the longevity of a person after any given age. Take the age of 20, for instance. At the age of 20, under the Northampton—it was 1780 it was compiled—it would be 33–43.

Q. 33–43?

A. 33–43 at the age of 20. Under the Carlisle table of 1815 it would be 41–46.

Q. When were the Carlisle tables first compiled?

A. They were first compiled in 1780, about the same time as the Northampton. The Carlisle was first compiled in 1780 and revised in 1815.

Q. It was the revised table you refer to there—revised in 1815?

A. Yes, sir.

Q. Now, what is the difference between those that you refer to?

A. The Northampton makes the expectancy at the age of 20 33–43, and the Carlisle makes it 41–46.

Q. Then there is a difference in that of about eight years?

A. Yes, sir. The Equitable of 1825 makes it 41–46; the 17 Offices

Experience of 1843 makes it 41–44; the English No. 43 makes it 39–48; the Institute of Actuaries of 1869 makes it 42–49.

Q. Now, then, you have got the expectancy at the age of 20. What would it be at the age of 24?

A. The only way to reckon that would be to take the expectancy under the Carlisle table at the age of 20, also at the age of 30, and compute the difference between the expectancy under the Carlisle table at the age of 30, 34–34, and at the age of 20, 41–36; the difference between them would be 7½; that is about what it would be at the age of 24.

SMITH: That would make about 37 or 38.

Q. Now, then, by the others.

A. The other table, the Equitable of 1825, would be a year difference.

44 Q. That is, a man would not live as long by a year?

A. The Equitable of 1834 would be the same as the Carlisle; also the 17 Offices; the English No. 43 would fall about two years less; the Institute of Actuaries would be some 36–37.

Q. They range, then, the expectancy of life at that age, from 34–37?

A. Yes, sir; that is what the authorities would lead me to believe.

Q. So that a man who is 24 years old, the probabilities are of his living to be 60 or thereabouts?

A. Thereabouts; yes, sir.

Redirect:

Q. I understand the later authorities give a longer time, as a rule. Do they, Doctor?

A. No, sir; very few; for instance, comparing the Carlisle of 1815 with the Institute of Actuaries of 1869, there is but very little over one year difference.

Mr. WILLIAMS: I understand, Doctor, that these authorities on the expectancy of life are what any insurance company would act upon?

A. They do act upon it.

B. T. LLOYD sworn for plaintiffs:

Q. What was your business on the 11th of December, 1885, Mr. Lloyd?

A. I was a section hand.

Q. On what section?

A. I don't just remember. It was the north section from Market Lake.

Q. Section closest north from Market Lake?

A. Yes, sir.

Q. Do you remember the circumstances of a wreck having occurred between Market Lake and Hawgood on the morning of the 1-th of December?

A. Yes, sir.

45 Q. Did that wreck occur upon the section upon which you were working?

A. Yes, sir.

Q. On what part of that section?

A. North—the northern end—a little over half way, I think.

Q. Where was that with relation to Hawgood?

A. Between four and five miles, somewhere near that, south of Hawgood.

Q. When were you last over the track on that section previous to this accident?

A. Night before.

Q. What time was it?

A. It was between four and six o'clock.

Q. In the afternoon?

A. Yes, sir.

Q. What was the condition of the track that afternoon—the afternoon of the 10th?

A. Well, it was—some places it was pretty good and some places it wasn't so good.

Q. How was it at this particular point where the wreck occurred; anything unusual with the track there?

A. No, sir.

Q. When were you next over the track?

A. I was over the track the next morning.

Q. At what time?

A. Well, I don't know exactly what time. I went over the whole track.

Q. What time were you at the point of the wreck?

A. Some time between six and seven o'clock, as near as I can remember.

Q. What was the condition of the track at that time?

A. Well, when I arrived there I found the track torn up and the train on the side thrown in the ditch.

Q. Well, tell us how the track was torn up, Mr. Lloyd.

A. The track was—a broken rail, somewhere between 7 and 10 feet, broken right out, and the other rails south of it were torn up, at least they were found all out of their regular place, but some of them were bolted together; spikes torn out and ties broken, a good many of them.

46 Q. How much—was there more than one rail broken?

A. Yes, sir.

Q. How much was broken—how many?

A. There was one rail that was broken, I think, if I remember correctly, in five pieces, and the other rail—that is, the south rail—the north rail was broke—not off, I think, not entirely off—it was cracked open, and the south rail was broken in about five pieces, if I remember correctly. After thrown out of line the rail was kept together there for probably two or three rails length.

Q. That had been caused by the wreck—tearing up the ties and pulling the spikes?

A. Yes, sir.

Q. Was there any bad places of that character elsewhere on your section?

A. There was low joints and battered rails.

Q. How many—more than one?

A. Oh, yes; more than one.

Q. Was there anything unusual in the condition of the track at any other place?

A. No, sir; not that I know of.

Q. How far did your section extend north from this point—point of the wreck?

A. Somewhere near a mile and a half, I think.

Q. How near did you go to Hawgood?

A. Places in the track——

Q. (Interrupting.) How near did your section go to Hawgood?

A. It went within about three miles from Hawgood; the posts were not up then. We used to reckon it three miles from the end of the section to Hawgood.

Q. Were there any joints in that section in such condition that they would have attracted particular attention in passing over them in a train?

Mr. WILLIAMS: I object to that, unless it is shown that the witness would know that fact.

Mr. SMITH: Well, I will ask him another question.

Q. Were you in the habit of passing over that section, Mr. Lloyd?

A. Yes, sir.

Q. How often do you say you passed over it?

47 A. Generally passed over it first thing in the morning.

Q. Would you walk or go on a hand car?

A. Sometimes we would walk and sometimes go in a hand car, according to the location of our work; sometimes one man would go over the track to the end of the section and see that the track was all right, and then he would return and go to work.

Q. Was it your custom to pass over the track every day?

A. Yes, sir.

Q. How did you go on the afternoon of the 10th?

A. We passed over in a hand car.

Q. Now, I will ask you if there were any joints along there that would attract your attention.

Mr. WILLIAMS (interrupting): In a hand car?

A. I don't think there was.

Q. Did they attract your attention?

A. No; there was some low joints, but I don't think there was a low joint on the section that would cause a lurch in a train that has been described.

Cross-examination:

Q. Did you ever railroad in connection with operating trains—running on trains?

A. No, sir.

Q. You have never been employed on a railroad train, either freight or passenger?

A. No, sir.

Q. Then your riding upon railroads has been occasionally, as your business or pleasure induced you to go as a passenger ordinarily?

A. Yes, sir.

Q. In going over with a hand car about what speed did sectionmen or did you in connection with your fellow-sectionmen ordinarily travel?

A. Well, I hardly know, I am sure; I never timed myself. We didn't ride very fast.

Q. Might it not be that a hand car would pass over a defect in a track that would not be observable when the weight of an engine or train might make it noticeable?

48 A. Well, I do not know. It might be observed if sufficient weight was brought upon it and might not be; it might be apparent.

Q. There was, you say, occasionally a low joint?

A. Yes, sir.

Q. I wish you would describe what you mean by a low joint.

A. What I mean by a low joint, of course, where the rails are joined together they are bolted together with fish-plates, and the place where the low joint would be would be something like that; like my fingers are together (illustrating); the two ends—the top of the two ends—were depressed—just the top. Of course, some more than other joints would get down in that shape.

Q. Were they usually battered where there were low joints?

A. Some were battered and some were not.

Q. When they were not battered what was it that accounted for them being low?

A. Well, there is a depression on the tie, sir; it would be this depression on the tie; it would depend upon the tie and ground to some extent. Of course, if the ends of the rails were battered, why then they might be depressed at the ends of the rail or where the rail or two rails had been joined together, or wherever the battered place is the track closed down that much more so.

—. How long had you been working on that section at that time, Mr. Lloyd?

A. On this Market Lake section?

Q. Yes, sir.

A. Somewhere near six months; probably not so much; I disremember.

Q. Who was section foreman at that time?

A. My father was section foreman on this section.

Q. His name was Ben. Lloyd?

A. Yes, sir.

Q. Was that section 30? Can I refresh your memory?

A. I believe it was.

Q. Whenever a rail was broken do you know whether or not the

foreman was in the habit of making a report of the break?

A. Yes, sir.

Q. Was he required to do so as part of his business duties?

A. Yes, sir.

49 Q. Do you know whether the foreman made a report of that break?

A. Yes, sir.

Q. Who made it out?

A. I did that myself.

Q. Done it for your father?

A. Yes, sir.

Q. Were you in the habit of making them out?

A. Yes, sir.

Q. You had a printed form?

A. Yes, sir; I think we had.

Q. Does that look generally like the papers you had?

A. Yes, sir.

Q. Who furnished you the data on which that was made with reference to the number of pieces that were broken? Did you look at it yourself?

A. Yes, sir; went and measured the pieces that morning.

Q. Now, how many rails were broken, according to your memoranda?

A. Two rails.

Q. You think there were two rails?

A. I don't think there were any more. I know there were two.

Q. Well, now, in making out this report, would your father report two rails broken?

A. Yes, sir; if I remember, on the north rail there was about two feet broken off that wasn't reported at that time, because it was—it is only cracked, and we didn't notice it.

Q. It wasn't broken clear in two?

A. No, sir.

Q. It was your habit to measure those pieces of broken rails, was it, so as to make a report?

A. Yes, sir.

Q. I show you here what purports to be the report that was made out that day.

A. That is the report exactly.

Q. That is your handwriting?

A. Yes, sir; my own handwriting.

50 Q. Now, you remember the facts; this is a correct report of the pieces?

A. Yes, sir; but I remember that we got a note back from Mr. Lane, the road-master's clerk, stating that it was wrongly measured, because they didn't come up to a full-length rail. I don't remember what it was; there was some pieces, I think—there was something that wasn't given right, but we counted that time and there was between 11 and 13 inches that was gone.

Q. That you didn't find?

A. Yes, sir.

Q. There was one length or piece that you didn't find?
A. Yes, sir.
Q. What was the length of the pieces that you found?
A. 1 foot 10 inches, 1 foot 11 inches, 14 inches, and 25 feet 11 inches.

Mr. WILLIAMS: He identifies that and I offer it, in connection with his testimony, to the jury.

Mr. SMITH: I understand that these are lengths of the pieces that you found there?
A. Yes, sir.
Q. One was 1 foot 10 inches, another 1 foot 11 inches, another 14 inches, and the rail that was left 25 feet 11 inches?
A. Yes, sir.
Q. Well, that lacked a little of being a whole rail?
A. Of course. We weren't certain whether it had been cut or not, but it didn't appear to be.
Q. It appeared to be a whole rail?
A. Yes, sir.

Mr. WILLIAMS: I offer this report as to this broken rail in evidence.
Mr. SMITH: We have no objection.
COURT: It will be received in evidence, marked "Exhibit 2," and is in the following form, to wit:

"Form 2513.

On sec. No. 30 at Market Lake.
Discovered Dec. 11th, 1885, at 4.35 o'clock a. m., by 602.
North or south rail? South.
East or west end of rail? West.
51 How many breaks? Four.
Length of pieces? 1 foot 10 inches, 1 foot 11 inches, 14 inches, 25 feet 11 inches.
Whole length of rail? Thirty.
Chair or fish joint iron? Fish.
Iron or steel rail? Iron.
What brand? 35 lb.
Was rail battered at joint? No.
Was the break on a tie or between ties? One was—first.
Was the piece found in or out of place? Out.
Did any accident occur from the break, and to what train? Yes; 602.
What train broke the rail, if known? Am not certain.
What do you know or suppose caused rail to break? Where it broke was in a solid-rock cut; when the train came on it with a heavy load it could not give any other way only to break.

BEN. LLOYD, *Foreman.*"

"There is one piece of rail gone just about 12 inches long. I can't find it.

BEN. LLOYD,
Sec. Foreman."

Mr. WILLIAMS: Call your attention to the memorandum there and wish you would describe the road-bed at that point of the break and say if that refreshes your memory as to that, and describe about the formation of the ground there at the point of the break, as near as you can remember.

A. Describe it by lines?

Q. I merely call your attention to that. You can describe it by that—the place where the rails were broken.

A. Well, the road-bed where the rail was broken was through a—was running through a small rock cut.

Q. What do you mean by a small rock cut?

A. It wasn't deep; probably two—about three feet deep, and a rock cut. I don't remember the length, but somewhere—before you get to the rock there is a fill; there was a hollow running, as I remember, east and west, and the rock cut is on the north, and as the train came out of the rock cut the rail broke——

Q. (Interrupting.) The train, as I understand you, had passed pretty near through the cut, going east——

A. (Interrupting.) Yes, sir.

Q. —when the rail broke; near the east end of the cut?

52 A. Yes.

Q. That was a rock cut, you say?

A. Yes, sir.

Q. What was the formation?

A. Lava—lava formation. In building the road they had to blast out the cut—blast it to get the rock out, so that the road was on a solid formation. Of course, then they filled in with dirt; of course, the bed was solid rock.

Q. Called a rock cut?

A. Yes.

Q. You made this memorandum in your book at the same time?

A. Yes, sir.

Q. There was one piece of rail that you could not find?

A. About 12 inches long that we could not find.

Q. There were four breaks?

A. Yes, sir.

Mr. WILLIAMS (referring to report in evidence): Will consider this in. There is a little data there that I didn't call attention to.

COURT: I do not care to read it; it is a blank form.

Mr. WILLIAMS: I merely call your honor's attention to the number of breaks that occurred.

Mr. SMITH: We will read it to the jury.

Blank form of report about bad place in track read to jury.

Mr. SMITH: What does that mean in that connection?

A. The way the track lays there, that it was the rail on the west side.

Q. The rail on the west side?

A. Yes, sir.

Q. On the west side instead of the south? East or west end of the rail?

A. West.
Q. What does that mean?
A. Means the location of the track.
Q. Then there was one 1 foot 10 inches, one 1 foot 11 inches, one 14 inches, and one 25 feet 11 inches?
Mr. WILLIAMS: Was the break on the ties or between the
53 ties? I would like to call Mr. Lloyd's attention to that. Was the break on a tie or between the ties?
A. One was.
Q. One break was on a tie?
A. Yes, sir.
Q. Does that mean—it says that one piece was found so and so.
A. That means at the place. One break was on a tie. The first break was on a tie.
Mr. SMITH: This is the first one (illustrating)?
A. Yes, sir; that is on a tie.
Q. Was the pieces found in or out of place?
A. Out.
Q. What you meant to state by that was the first break was on the tie?
A. Yes, sir.
Q. What was the length of your section, Mr. Lloyd? Do you remember?
A. No; not exactly; somewhere near seven miles, I believe, to the south end of it. At the south end of it was a post.
Q. Where was Market Lake station from this end?
A. It was right between the post and the tank.
Q. Substantially the south end of it was Market Lake station?
A. Yes, sir.
Q. Your section extended north from that—that is, west, as railroad language makes it?
A. Yes, sir.
Q. Seven miles?
A. About seven miles; that was what we used to call it.
Q. Were the mile-posts up at the time you worked on the road?
A. No, sir; they wasn't.
Q. So that the seven miles was estimated? Was it measured?
A. No, sir; it wasn't measured. It was what we called seven miles. We got it from the people there.
Q. You didn't know whether it was actually measured or not?
A. No, sir; I didn't.
54 Q. You say at the end of the section was a post. Was it marked?
A. It was marked where the post stood.
Q. It is upon the section?
A. Yes, sir.
Q. Have you ever been to the place of the wreck since the time you reported the track?
A. No, sir.
Q. Not in that cut where the wreck occurred after the track was put in good order again?

A. Well, we passed over it after we quit work.
Q. Have you worked on that section since?
A. No.
Q. How long after that did you stop?
A. It was in December, 1885.
Q. A year ago last December that you left there?
A. On the 23rd of December, if I remember correctly—20th or 23rd, if I remember right.
Q. A few days afterwards?
A. Yes, sir.
Q. You have not been working there since?
A. No, sir.
Q. Do you remember, with refreshing your memory, whether the joint on that rail was battered or not?
A. No, sir.
Q. You don't think it was on that rail?
A. No, sir.
Q. Where the rail was broke?
A. No, sir.
Q. It appeared to be in good condition prior to the breakage, as far as you could discover?
A. Yes, sir.

Mrs. LINNIE M. PALMER sworn for the plaintiffs:

Q. What is your name?
A. Linnie M. Palmer.
Q. You are one of the plaintiffs in this action?
A. Yes, sir.
55 Q. Did you know William O. Palmer in his lifetime?
A. Yes, sir.
Q. What relation did he bear to you?
A. My husband.
Q. When did you last see him alive, Mrs. Palmer?
A. The last time I saw him alive was some time in November, the year 1885.
Q. And when did you next see him?
A. I saw him the 11th of December, the day of his death. No; I didn't see him until the next day——
Q. Until the day after his death?
A. Yes, sir.
Q. What was his age at the time of his death, Mrs. Palmer?
A. He was 24 on the 15th of July preceding the December that he was killed.
Q. When were you married?
A. 18th of June, 1884.
Q. Had you any children?
A. Yes, sir.
Q. What was the name of your child?
A. Alfred Merle.
Q. How old is your child now?
A. He was two years old the 31st of last March.

Q. What was the condition of your husband's health prior to the time of his death?

A. He was very healthy. I never knew him to be sick.

Q. How long have you known him?

A. I had known him about five or six years before we were married?

Q. When were you married to him?

A. A year and a half before his death.

Q. What were his habits?

A. They were very moral.

Q. Was he a temperate or intemperate man?

A. He was a very temperate man.

Q. What was the nature of your domestic relations?

Mr. WILLIAMS: I object to that.

COURT: She can answer the question if you insist on it.

HAWLEY: This matter has been argued before the court
56 once, and I suppose the court is familiar with the authorities upon the subject.

COURT: I do not remember the authorities and don't think I ruled upon it.

Question withdrawn.

COURT: I am not entirely clear upon the question, and it will probably take some time to look it up.

Q. Mrs. Palmer, what were the monthly earnings of your husband previous to his death?

A. Just before his death he was getting then $2.85 a day.

Mr. WILLIAMS: You had that simply from Mr. Palmer, did you not?

A. Yes, sir; but I think I can prove it.

Mr. WILLIAMS: No doubt you have heard him tell you, and of course I suppose that is the fact, but I think better proof might be had. I am in the habit of objecting to what I do not think is evidence, and I move to strike out her answer to the question. She says she does not know it only by Mr. Palmer telling her so; clearly it is hearsay.

By the COURT: It may be stricken out.

Cross-examination:

Q. You say you were acquainted with Mr. Palmer five or six years before you were married?

A. Yes, sir.

Q. And at the time you were married he was nearing his 23rd birthday?

A. Yes, sir.

Q. Would have been 23 the following July? He was quite a young man when you first met him?

A. Yes, sir; 18.

Q. He was a carpenter?

A. Yes, sir; his trade was cabinet-maker, but he worked at carpentering also.

Q. Was he working at that business at the time that he was married?

A. Yes, sir.

57 Q. Where had he been working during all the time that you knew him?

A. He was working on the railroad.

Q. The last you seen of him before his death was some time in November, you say?

A. Yes, sir.

Q. Do you remember how long before his death?

A. I think the 16th or 17th of November.

Q. Where was your home at that time?

A. My home was in Logan.

Q. In Utah?

A. Yes, sir.

Q. Was it there that you last saw him alive?

A. Yes, sir.

Q. Had that been your home all the time since your marriage?

A. Yes, sir.

Q. Was his home before your marriage, was it?

A. Yes, sir.

Q. About how often, while he was at work in this employment, was he in the habit of coming home?

A. At different times. Sometimes he came once in a week; sometimes once in a month. He would come home——

Q. (Interrupting.) His visits were somewhat irregular?

A. Yes, sir. Sometimes he would only be gone a week and sometimes be gone a month.

Q. How long would he remain at home on those visits?

A. Sometimes he would stay several days, and sometimes he would stay only one day.

Q. I suppose it would depend somewhat upon the distance he was engaged at the time from home?

A. Yes.

Q. After your marriage and up to the time of his death did you know the terminal points between which he worked—that is, what was the furtherest point, south and north, that his work extended, if you know?

A. I think he worked as far south as Ogden and as far north—well, I think he worked clear to Garrison.

Q. That is the north end of the Utah and Northern road, as I understand it?

58 A. Yes, sir. That wasn't his regular work.

Q. Sometimes he would be sent to do this work?

A. Yes, sir.

Q. Well, what was——

A. (Interrupting.) I think his regular division was from Ogden to Eagle Rock.

Q. You say you never knew him to be sick?

A. No, sir.

Q. About what was his height and weight?

A. I don't really know his height. I know he weighed 170. He told me that not long before——

Q. (Interrupting.) Above the average size, then. Tall?

A. Yes, sir; rather tall.

W. F. FISHER sworn for the plaintiffs:

Q. What is your name?

A. William F. Fisher.

Q. Did you know William O. Palmer in his lifetime?

A. Yes, sir.

Q. How long had you known him previous to his death?

A. Well, I have known him, but not intimately, from the time he was about 16 years of age; but I knew him quite well from the time he was about 18.

Q. What relation, if any, did he bear to you?

A. Married my daughter.

Q. What was his age at the time of his death?

A. 24 in July prior to the December of the accident.

Q. You say you had been intimately acquainted with him since he was about 18?

A. Yes; more so, though, after he was 21 or '2; but then I have known him quite well; knew his parents.

Q. What were his habits, Mr. Fisher?

A. They were strictly temperate and moral. I never knew a young man with better habits.

Q. What was the general state and condition of his health?

A. I never knew him to be sick. I only knew him to be laid up once, and that was when he fell off a building and hurt his ankle.

Q. Was he a man of stout, robust consititut-on?

59 A. Yes, sir; much more than the ordinary.

Q. Do you know what wages he was earning?

A. I am like Mrs. Palmer—only what he told me.

Q. Have you ever heard his boss——

A. (Interrupting.) I have.

Mr. WILLIAMS: I object to that.

Q. Do you know Mr. Barraclough?

A. Yes.

Q. What position did Mr. Barraclough have upon the railway?

A. He was superintendent of the bridge train.

Q. You have heard him state what the wages of Mr. Palmer were?

A. Yes, sir.

Q. What were those wages?

Mr. WILLIAMS: I object.

Q. Did you hear him state that?

A. At my house.

Q. Mr. Barraclough was boss of the bridge train?

A. He was at the time of this bridge train. At the time my son-in-law was killed he was boss of the gang.

Mr. SMITH: We submit, if the court please.

Mr. WILLIAMS: I object, if your honor please. This is only hearsay.

COURT: Do you know whether he had authority to contract with and hire the men?

A. Yes, sir; I have understood that he has the employing of the men for that work. He was acting as superintendent.

Mr. WILLIAMS: He would have to employ mechanics simply as foreman or agent of the company in that line, and as such had authority to fix the wages and direct what they may be, but I think that he was governed by his instructions as to what wages to pay.

WILLIAMS: That was the fact, so far as you know?

A. Yes, sir.

Q. Do you not know whether he had authority to fix them or simply to carry out instructions?

A. I am satisfied that he carried out instructions.

By the COURT: I think you may ask the question.

60 SMITH: Did Mr. Barraclough ever tell you whether or not he made up the pay-roll?

A. No, sir; he did not.

Q. Did you hear him state in court whether he did or not?

A. If my memory serves me correctly, I think he did make up the pay-roll for the mechanics.

Q. Did he not state so in court?

A. That is my understanding.

Mr. WILLIAMS: Gentlemen, have you any trouble in proving that if Mr. Barraclough comes? I think we had better pass it for the present.

COURT: I will give you an opportunity to send to Pocatello to get what witnesses you see fit.

SMITH: We withdraw the question for the present.

G. W. BARRACLOUGH sworn for the plaintiffs:

Q. What position did you occupy on the 11th of December, 1885?

A. Foreman of the bridge-building department.

Q. What road?

A. Union Pacific Railway Company.

Q. On what road?

A. On the Utah Northern.

Q. Did you know William O. Palmer?

A. Yes, sir.

Q. What wages was he earning previous to the 11th of December, 1885?

A. His wages was $2.85 a day.

Q. About how many days could he make a month?

A. I think he would average about 28 days a month.

Cross-examination:

Q. In what work—what kind of work did he do to earn his money?

A. On bridge repairs mostly.

Q. He was what would be denominated a bridge carpenter, was he?

61 A. Yes, sir.

Q. Working under your direction as foreman of a gang at that time?

A. Yes, sir.

Q. What were the limits or terminal points between which he did this work?

A. Well, there was different limits at different times. I could not remember the whole of the time.

Q. About what was the general range of the road that he worked on?

A. The last three months he was over all the road between Ogden and Melrose.

Q. Melrose; how far is Melrose north of Ogden?

A. I don't know the exact distance; must be about 330 or '70 miles.

Q. That is on the line of the Northern road in Montana, a short distance from Butte—Melrose—is it not?

A. Yes, sir.

Q. Where did Mr. Palmer board while engaged at his work in this business?

A. The latter part of the time he boarded with me.

Q. Where did you furnish the board?

A. On the cars.

Q. At whatever place the work was required to be done?

A. Yes, sir.

Q. You had an outfit that you traveled and worked with?

A. Yes, sir.

Q. What was that called? Describe it.

A. It was called a bridge-building outfit.

Q. What did it consist of?

A. It consisted of box cars mostly; four box cars fitted up for that use.

Q. And those were used for what purpose?

A. One car was used for the men to sleep in; one was used for a kitchen and dining room, and two were used as store-rooms.

Q. And this outfit was moved from place to place as you had occasion to move from different points to work?

A. Yes, sir.

62 Q. How long had Mr. Palmer been boarding with you in that way at the time of his death?

A. I think about a year.

Q. What was the cost of his board?

A. Cost five and a quarter a week or twenty-five cents a meal.

Q. Where was his home at the time?

A. When he went home his home was in Logan, Utah.
Q. Logan, Utah?
A. Yes, sir.
Q. About how often during the time he boarded with you did he visit home?
A. Sometimes it would be a month, sometimes two or three months, according to the distance that we were away.
Q. How long did it usually take him to make a visit home? What was the length of the visit when he did go?
A. He didn't usually stop more than a day; would make it a point to go some day when we were not working.
Q. Of course, the time that he was gone would depend some upon the distance his outfit was from home at the time?
A. Yes, sir.
Q. Engaged in this business, how was the time kept—account of the days actually worked?
A. Yes, sir.
Q. Account of the days actually worked, and the bridge on which the work was done?
A. Yes.
Q. So that it was day labor that he was paid for?
A. Yes, sir.
Q. An account was kept of the number of days put in?
A. Yes, sir.
Q. You think about 28 days would be the average for the month; so that he worked Sundays sometimes?
A. Worked Sundays sometimes.
Q. Sometimes worked extra hours?
A. Not very often; sometimes in case of a washout.
Q. The actual days were on account of working one or two Sundays each month?
A. Yes, sir.
63 Q. You were acquainted with Mr. Palmer's personal habits, expenditures, and so on, in a general way?
A. Yes, sir; I believe I was.
Q. He was a temperate man, I understand?
A. Very temperate.
Q. Was he in the habit of using stimulants in the way of drink?
A. No, sir.
Q. Was he wholly abstinent, or what you would call a temperate man?
A. He was a temperate man. I do not think he would take a drink of liquor not once in two months.
Q. Did he use tobacco?
A. Very moderately; did to a moderate extent.

Redirect:

Q. What was the condition of his health, Mr. Barraclough?
A. It seemed to be good.
Q. Good, stout, healthy man?
A. Yes, sir.

Q. I believe you stated that his board and lodging was $5.25 a week?

A. Yes, sir.

Plaintiff rests.

Mr. WILLIAMS: If your honor please, at this point we desire to argue a motion for a nonsuit. I will state the grounds and beg permission to put it in writing afterwards. I move that judgment of nonsuit be entered against the plaintiffs on the ground that the evidence fails to show any negligence on the part of the defendant contributing to the death of the deceased, and the evidence fails particularly to show the negligence alleged in the complaint as the ground of action, in that there is a failure to show that the broken rail was permitted to remain upon the track, and that that caused the death of Palmer, and upon the further ground that there is no evidence to show or support the averment that is made in the complaint, and which is denied, that he was a passenger at the time of his death. I do not care to take up time in an argument.

64 By the COURT: The motion is denied. Inasmuch as we have a jury, I do not give my reasons for denying it.

Exceptions taken to the ruling of the court.

E. E. JONES sworn for the defendant:

Q. Mr. Jones, state whether or not you are employed in a department of the Union Pacific Railway Company at the present time.

A. Yes, sir.

Q. In what department?

A. Engineer department.

Q. Who is division engineer under whom you are employed?

A. Mr. Holbrook.

Q. Where is his office—headquarters?

A. Pocatello, Idaho.

Q. Are you acquainted with the line as actually located and existing between Market Lake and Hawgood switch?

A. I think so.

Q. Have you ever assisted in running a line between those points?

A. Yes, sir.

Q. When was that?

A. It was in August or September last.

Q. I wish you would state what the general purpose of that survey was which you assisted to make.

A. The general purpose was in getting the exact location of the road in connection——

Q. (Interrupting.) Ask you to state whether or not connection was made with Government surveys.

A. They are made with Government surveys with different section lines.

Q. How much of this road did you assist in surveying for this purpose?

A. About 200 miles.

Q. Commencing at what place?

A. Below Pocatello about one mile.

Q. And extending to what point?

A. Collin, Montana.

65 Q. Was all that field-work done last year?

A. Yes, sir; last year and fore part of this year.

Q. You remember the running of the line between Market Lake and Hawgood, do you?

A. Yes, sir.

Q. Did you assist in running any particular part—that is, in taking notes on the line?

A. I don't remember taking notes of this part of the line. I had assisted in taking notes.

Q. I ask you to state where this plat that is now presented was prepared.

A. It was prepared in the office in Pocatello.

Q. I wish you would state whether or not the notes that were taken on this survey—whether it conforms to them, if you remember them.

A. Yes, sir; it does.

Q. Wish you would state what the red line indicates.

A. That indicates the Utah Northern railway.

Q. You may state whether or not as laid down there it conforms to the notes taken.

Mr. HAWLEY: We object to any further questions on the part of this witness in regard to the questions on this subject until we have a chance to cross-examine.

Cross-examination:

Q. What position did you occupy in that survey?

A. I was a chainman at the time.

Q. Are you a surveyor by profession?

A. No, sir.

Q. What is your business or profession?

A. I have no profession. My business is clerk in the engineer's office.

Q. Then you are not a surveyor?

A. No, sir.

Q. Who had charge of this survey in which you assisted?

A. Mr. J. B. Rogers.

Q. Where does Mr. Rogers reside?

A. He resides in Boston at the present time.

66 Q. Who else was with you on the survey?

A. A man by the name of Guthridge, Clark, Steadman, Rogers, and myself.

Q. Your principal business there was carrying chain—one of the

chainmen? The figures—you stated that you set down figures occasionally?

A. Yes, sir.

Q. Were those figures set down at the request or by the direction of the surveyor in charge?

A. Some of them.

Q. He told you what to put down?

A. Yes, sir.

Q. You acted under his direction in putting down the figures?

A. Yes, sir.

Q. The figures that you put down were not the result of your own observation?

A. Well, a good deal——

Q. (Interrupting.) Not the result of your own calculation, were they, at the time?

A. No, sir.

Q. You do not recollect a point produced on this survey between those two points—Market Lake and Hawgood—except as chainman?

A. That is all; yes, sir.

Q. You recollect nothing in particular about the location, different points, and distances and all that?

A. No, sir.

Q. How many times have you been over that road? Were you over that road before this time that you assisted in making this survey?

A. I think I was; I could not say.

Q. In what capacity?

A. As a passenger on the train.

Q. Have you been over since?

A. Yes, sir.

Q. As a passenger?

A. Yes, sir.

HAWLEY: We submit, your honor.

67 HAWLEY: In whose handwriting are those field-notes made?

A. Those field-notes are made in the handwriting of Mr. Rogers.

Q. Where is Mr. Rogers?

A. Boston.

Q. He was surveyor for the railroad?

A. Yes, sir; engineer in charge.

We submit, if the court please, that this witness cannot testify on this map. In the first place we think he is not a competent person to testify. He was simply on the survey as a laborer—one of the chainmen.

Mr. WILLIAMS: I desire to interrogate a little further, your honor.

Q. Ask you to state, Mr. Jones, how long you were in the field; how long you have been in the field with a survey party assisting.

A. All together, about five months.

Q. State, if you please, whether or not during that time you paid any attention to or received any instruction with reference to reading the theodolite or compass.

A. Yes, sir; I have.

Q. Read angles and took bearings?

A. Yes, sir.

Q. In acting as chainman in connection with this surveying party ask you to state whether or not you kept daily account of the distances or whether that was a part of your——

A. (Interrupting.) Yes, sir; that was part of my business.

Q. You kept daily account when measuring distances?

A. Yes, sir.

Q. What did you do with such daily——

A. (Interrupting.) When we met the trace man we kept the notes and gave him the plusses and additional distances.

Q. Were they put down in his notes in your presence?

A. Sometimes they were; yes, sir.

Q. Wish you would state whether or not he habitually, so far as you know, put them down as reported by you in such instances as that.

A. Yes, sir.

Q. Ask you to state whether or not you took any bearings
68 or readings of the compass in connection with any other person or alone on that survey.

A. I could not say on this survey. I have.

Q. Have done so during the time that you was in the field?

A. Yes, sir.

Q. For the purpose of recording them in the minutes of the surveys?

A. Yes, sir.

Q. You say Mr. J. B. Rogers was the surveyor in charge of this field operation?

A. Yes, sir.

Q. Are you so familiar with all the notes taken on the survey in the field that you can understand and read them as they are taken down by the surveyor?

A. Yes, sir; a great many of them.

Q. Are you familiar—could you read all the notes that were taken on this survey of the courses, distances, curves, degrees, etc.?

A. Yes, sir.

Q. You may state whether or not you did, at the request of the engineer in charge, at any time or times while making this general survey along the line, assist him in taking notes and reading from the compass.

A. Yes, sir; I have.

Q. Was that at his request and under his direction?

A. Yes, sir.

Q. You say you have since looked at the notes that were preserved and made on this survey.

A. Yes, sir.

Q. And are able to read those notes?

A. Yes, sir.

Q. And able to determine from those notes as engineers do the question of the correctness of the line as indicated here?

A. Yes, sir.

Mr. WILLIAMS: I submit, if your honor please, that while this young man is not and does not profess to be a civil engineer, yet with the practical experience he has had in the field and the assistance he has rendered is more than merely carrying the chain; his knowledge is shown of reading the compass and theodolite, and the fact that he has read from them and it is entered in the notes
69 under the direction of his superior, coupled with the knowledge that the mere running of a line and curves is one of the simplest pieces of engineering, we think that he has shown sufficient knowledge here from the testimony to warrant the introduction in evidence of his statement. We think this is an actual survey that he has assisted in making of the line of the road between those two points in connection with Government surveys, and upon that I desire first to ask him a few questions.

Q. I wish you would explain what was done in that connection, Mr. Jones.

Mr. HAWLEY: We object to his enquiring into the correctness of this map, or anything except his qualifications.

Mr. WILLIAMS: I think the questions I shall ask will go to show and inform the court of his qualifications when he testifies to what he knows with reference to what was actually done with reference to running the line of the——

By the COURT: He may tell if he knows.

WILLIAMS: You may state what was done in making this line of survey, if anything, in connection with the Government line of survey.

A. You would start here from this corner of the section—corner line—cross this line and go over to the center line of the track; then from that we chain from this corner and get the exact locations; from there we chain up this line; then chain north to the section line; then we chain somewhere up here to the center of this main track and get the exact distance.

By the COURT: That would not give us a very intelligent history——

Mr. HAWLEY (interrupting): Call the corners and sections and the course in which you run the section line.

A. That would be the west—southwest corner of section 32. We would run east to the center line of the track of the Utah Northern railway, and get this exact distance between the Utah Northern railway and this southwest corner of section 32; from the center line of the track of the Utah Northern railway we would proceed on east to the southeast corner of section 32, and get the exact distance between the center line of the track of the Utah Northern and this southeast corner of section 32; thence we would run north to the

northeast corner of section 32, turn at right angles and
70 run to the northwest corner of section 32, and get the exact distance between the center line of the track of the Utah Northern railway and the northeast corner of section 32; thence get the exact distance between the northwest corner of section 32 and the center line of the track of the Utah Northern railway; thence come back here to where this line strikes this south line of section 32.

Q. Where the railroad strikes it?

A. Yes: and proceed with the alignment.

Q. Now, what would you do, if anything, with reference to taking the angle and intersection of the section line and the railroad line? Did you do anything in that regard?

A. Yes, sir. Those angles are taken with the section lines and the Utah Northern railway where they intersect.

Q. Where they intersect?

A. Get this intersection with the instrument by sighting on this line—on this corner—to the southeast corner of the section.

Q. Then if you were to sight with the instrument from the center line of the track of the Utah Northern railway you could read the angle by that?

A. With one angle we can calculate the other angles; and the same with this line over here. The north line of section at the intersection of the north line of section 32 and the Utah Northern railway being half the distance of the angles, we know the direction of the line; by calculating this curve we know the exact alignment.

Q. Ask you to state whether or not, in running the section lines, that was done by actual — government of a section.

A. Yes, sir; it was.

Cross-examination:

Q. Who is in charge of the engineer's office at Pocatello?

A. Mr. F. Holbrook.

Q. He is division engineer?

A. Yes, sir.

Q. And has a corps of assistants?

A. Yes, sir.

Q. You stated that you had been at work at that business five months?

71 A. Yes, sir.

Q. In the fields a- a chainman?

A. Yes, sir.

Q. Have you ever studied practical engineering as a business?

A. No, sir.

Q. What was your business before you went to work as a chainman?

A. I was in the railway office.

Q. As a clerk?

A. Yes, sir.

Q. Then your only experience in this engineering department is this five months you served as a chainman?

A. I have had five months' experience in the office.

Mr. WILLIAMS: You mean in the engineer's office?

A. Yes, sir.

HAWLEY: Who made this map or diagram?

A. D. C. Roder.

Q. Where is he?

A. He is at Pocatello, Idaho.

Q. In the engineer's office?

A. Yes, sir.

Q. He is engineer and surveyor?

A. I think he is.

Q. He has seen the original map?

A. He draws from the map. This was drawn——

Mr. HAWLEY (interrupting): We object again both to the map and to his qualifications. It is clear they have got better evidence than this within their reach.

Mr. WILLIAMS: The witness says he has compared this with the notes.

Mr. HAWLEY: You know nothing about these notes outside the times you was helping to read by figuring and calculating and assisting the engineer?

A. That is all.

Q. Do you know of any particular place on this whole map—can you point out any particular place where you even read an angle?

A. No, sir; I can't remember any particular place.

72 Q. You did sometimes on this survey assist the engineer in a small portion of that work?

A. Yes, sir.

Q. Did you assist him in making his calculations?

A. Yes, sir.

Q. When in the field?

A. Yes, sir.

Q. In calculating the plot of the map contained in the map you were making?

A. Yes, sir.

Q. What part of the work did you do?

A. I was reading angles on the track there; drawing lines of the plat.

Q. Then you helped him draw lines at certain times?

A. Yes, sir.

Q. You know nothing about the drawing of the lines on this particular section?

A. No, sir.

Q. That was simply reading the lines or drawing the angles as laid down, as given by him, and giving the number of degrees?

A. Yes, sir.

Q. Did you ever study surveying at all in schools, or the higher mathematics?

A. No, sir.

Q. Do you know anything of the principles of surveying—the mathematical principles?

A. Some of them I do.

Q. About the calculations that is necessary to carry it out?

A. Yes; in the simpler portions.

Q. Did you ever—how high have you studied in arithmetic?

A. Well, I have studied algebra and some geometry and trigonometry.

Q. Never studied surveying as a science?

A. No, sir.

Q. Never studied the theory of, as laid down in books?

A. Yes; I have some.

Q. What work on surveying did you study?

A. Such as alignment, making angles and curves.

Q. Have you studied any work on surveying?

73 A. Oh, no, sir.

Q. You never have. Then you know nothing about the theoretical part as developed in the different books, even those studied in the higher schools and colleges?

A. No, sir.

Q. All that you know in regard to the subject is what assistance you have given as chainman and, incidentally, surveying?

A. Yes, sir.

Q. You know nothing of this particular map on this particular section?

A. No.

Q. And there are engineers in the office—there are engineers in the surveyor's office at Pocatello now?

A. Well, there is a division engineer; yes, sir.

Q. You didn't make this—this tracing; it is made by some other person?

A. Yes, sir.

Q. From the map that is in the office of the company?

A. I should think so; yes, sir.

Q. From the exact notes taken in the field? Did you see it made?

A. Yes, sir.

Q. Who made it?

A. D. C. Roder.

Q. He is there yet? Mr. Roder is the man in the office?

A. Yes, sir.

Q. He was not in the field with this party with Mr. Holbrook?

A. No, sir.

Q. Nor have you any regular engineer that was in the field with this party that is now in the Territory?

A. Not that I know of.

Q. Mr. Rogers, you say, is in Boston?

A. Yes, sir.

Q. I understood you to say in the beginning that you had compared this plat with those original notes taken on the survey?

A. I have.

Q. And found that the—those notes are correctly indicated on this line, indicated on this particular plat?

A. Yes, sir.

74 Q. Do you mean to say that you compared the notes with particular lines?

A. Yes, sir.

Q. Could you tell from those notes as to the accuracy, as to the perfect accuracy, by checking the curves on this map——

A. (Interrupting.) Yes, sir.

Q. Did you plat—did you figure it out?

A. Yes, sir.

Q. According to the notes taken?

A. According to the notes taken.

Q. Where is your plat; where did you do this work?

A. I did that at Pocatello.

Q. When?

A. About two weeks ago.

Q. How long did it take you?

A. Took me about four hours.

Q. To plat this whole thing? Did you do any figuring?

A. Yes, sir.

Q. What did you figure upon?

A. Figured on the degrees of curvature and checked that curve (illustrating); checked all these curves on this map; checked this map with the original; checked the degrees of curvature; checked these angles and checked the distances with the scale.

Q. You know nothing about the correctness of the degrees?

A. They are supposed to be——

Q. (Interrupting.) I am asking you from your own knowledge. You know nothing about it from your own knowledge? How old are you?

A. 19 years old.

Mr. HAWLEY: We submit that this evidence is not competent in any circumstance. This young man evidently knows nothing about this business.

Mr. WILLIAMS: Is J. B. Rogers now in the employ of the company?

A. No, sir.

By the COURT: I am inclined to think that much better evidence might be furnished, and if I were to hold to the strict rule I ought to exclude it, but perhaps it will be quite as well in this case. I think I will overrule the objection.

75 Exception.

Mr. WILLIAMS: Mr. Jones, I wish you would state what the scale of the plat is as it is drawn.

A. It is a scale of one thousand feet to the inch.

By the COURT: Little over five inches to the mile, is it?

WITNESS: Yes, sir.

WILLIAMS: Wish you would state whether or not upon the ground of this road the mile-posts are marked—marked on the ground along the line of the road. Is that true?

A. Yes, sir.

Q. Wish you would state whether or not those mile-posts are indicated upon this map.

A. Yes, sir; they are.

Q. What is the—from which end of the road are those miles counted along the road?

A. Counted from Ogden.

Q. In your railroad phraseology you call it east and west, do you?

A. Yes, sir.

Q. Wish you would state what the general direction of the line of the Utah Northern is.

A. The general direction is northwest.

Q. And you may state, if you please, what the course is generally between those two points which are indicated upon the map.

A. The general course is north.

Q. I wish you would state to the jury the mile-post nearest to Market Lake—the number of it as it is indicated upon the map.

A. 220.

Q. And which is the mile-post nearest to Hawgood siding?

A. 231.

Q. In which direction is post 231 from Hawgood siding?

A. That is north.

By the COURT: Where is Hawgood siding?

A. There is Hawgood siding (illustrating); there is the mile-post.

Q. Have you your notes of the distance between those two points with you?

A. No, sir; I have not.

76 Q. Do you remember the distance between Market Lake and Hawgood siding from the actual measurement?

A. No, sir; I do not.

Q. Could you tell it by the scale on the map?

A. I could tell it by subtracting the north plus from the south plus.

Q. Explain what you mean by the north plus.

A. Subtracting this plus here——

Q. (Interrupting.) What is that?

A. The south line of section 32 with the Utah Northern railway, from the north line of section 7 with the intersection of the Utah Northern railway.

Q. I wish you would take those figures at your convenience and make a computation so that you may state if those are actually from the notes taken in the field.

A. Yes, sir.

WILLIAMS: I will ask you about that hereafter.

Cross-examination:

Q. You say the general direction of this railway is northwest. You mean the entire railroad?

A. Yes, sir.

Q. How much west of north?

A. I could not say.

Q. You do not know? Your information is gleaned from a look at the location on the maps?

A. Yes, sir.

Q. Not from any knowledge or experience you have had?

A. No, sir.

Q. The general course of this map here is north, you say?

A. Yes, sir.

Q. What is the exact course of it? The exact course would be northwest?

A. The exact course; yes, sir.

Q. You say this railroad runs in a northwest direction?

A. Yes, sir.

Q. Not in a north direction? Can you tell, us is it exactly northwest—exactly northwest, do you call it? Do you speak of it in the engineers' parlance as northwest?

77 A. Well, yes.

Q. Is it west of north?

A. No, sir.

Q. Do you know the difference in degrees between west of north and northwest? How many degrees difference is there between northwest and west of north?

A. No, sir.

Q. You do not know. Can you tell us the difference in degrees between north, northwest, and west of north?

A. No, sir.

Q. You don't know anything about that. Then you don't know anything about the general direction of this road?

A. It is northwest.

Q. How many degrees in difference is there between a north and a northwest direction?

A. I don't know.

Q. How many degrees is there in a circle?

A. 360.

Q. What portion of a circle is northwest of north—quarter of a circle?

A. Yes, sir.

Q. Then one-fourth of 360 would be 90, would it not?

A. Yes, sir.

Q. Then there would be 90 degrees difference between northwest of north?

A. Yes, sir.

Q. Can you say, then, how many degrees difference there is, then, between northwest and north of northwest?

A. No, sir.

Q. You don't know anything about that? You say this is plotted on a scale of a thousand feet to the inch?
A. Yes, sir.
Q. How many would there be to a section? How many inches would there be to a section?
A. There would be about five inches.
Q. Do you know how many feet there are in a mile?
A. Yes, sir.
Q. How many miles there are in a section?
A. Yes.
78 Q. You stated in regard to the number of this section, township, and range. What did you state in regard to that?
Q. What township and range do you mean?
Q. In this line designated here. What township and range is it?
A. It gives it on the map.
Q. Tell us from the map, then, if you can tell us?
A. Yes, sir; doesn't give the range.
Q. Does it give the township?
A. No, sir.
Q. I think we can find it.
A. Oh, yes; township 5 north, of range 37 east.
Q. Is this all included in one township?
A. No, sir; two different townships.
Q. The portions of it marked?
A. Yes, sir.
Q. Is township- 5 and 6 all in one range?
A. Yes, sir.
Q. How many sections are there in a township?
A. Thirty-one—thirty-two sections in a township.
Q. A township is six miles square, is it not?
A. Yes, sir.
Q. Six multiplied by six is thirty-two, is it?
A. No, sir; thirty-six.
Q. What do you mean by the term "range?"
A. I could not tell you.
Q. Then you do not know what is meant by the term "north of range east?"
A. No, sir.
Q. Do you know what the term B. M. would mean, or N. R. E.?
No answer.
Q. Don't know whether it would mean Big Mogul or Boisé meridian, do you?
A. No, sir.
Q. How do they check—start the survey? How do they get the initial point?
A. By giving the meridians, I suppose.
Q. How would you start to get the meridian?
A. I don't know.
79 Q. Don't know where the initial point would be? Don't know where the initial point of this—what do you understand by the term "Boisé meridian?"

A. Meridian over Boisé, I suppose.
Q. Don't know?
A. No, sir.
Q. What is a meridian, anyway?
A. I don't know.
Q. Don't know what a range is or what a meridian is?
A. No, sir.
Q. How many miles it runs north and south?
A. No.
Q. East and west?
No answer.

TIMOTHY FARRELL called for the defendant:

Q. Mr. Farrell, you are acquainted with the general course of the Utah Northern railroad between Market Lake and Hawgood, are you?
A. Yes, sir.
Q. When did you first become acquainted with that portion of this railroad?
A. Seventeenth of February, 1885.
Q. That was when you first began running over that part?
A. Yes, sir.
Q. In what capacity at that time?
A. Conductor.
Q. What sort of a conductor?
A. Freight conductor.
Q. Freight conductor; and continued as freight conductor how long?
A. Until some time in November.
Q. Following?
A. Yes, sir.
Q. Then you stated you run as passenger conductor up to the time of this accident?
A. Yes, sir.
80 Q. Are you still running over that part of the road as conductor?
A. Yes, sir.
Q. And have been ever since the accident?
A. Yes, sir, with the exception of about a month.
Q. This has been your general business?
A. Yes, sir.
Q. Ask you to state where, prior to this accident, during the time that you were running there, whether or not you had passed over it in daytime.
A. Yes. I have passed over it frequently in the daytime.
Q. I wish you would look at the tracing that is there presented; look at the red line that runs from the south to the north end of the plat, and I wish you would state, after looking at that, to the jury what that indicates to you generally.
A. That indicates the railroad track between Market Lake and Hawgood.

Q. You may state whether or not it indicates it, so far as you are able to say, about as it exists upon the ground.

A. Yes. I should think it is exact.

Q. Starting at about there—Market Lake—you may state to the jury whether, going north, the road is on a straight line for a distance.

A. Yes, sir; it is a straight line.

Q. About how far is it straight?

A. It is a straight line for over three miles; about three miles, I should judge.

Q. And then is there a curve?

A. Yes, sir; there is a reverse curve.

Q. What is the character of the country about the first curve north after leaving Market Lake?

A. Well, you strike what we call lava country; it is broken and uneven from there to Hawgood.

Q. How is it at the point of the first curve?

A. Generally, the surface of the line, it is level—near level; what we term level.

Q. Then, as I understand you, from the point where you strike the first curve until you get to Hawgood it is more or less uneven in surface?

81 A. Yes, sir.

Q. Where is the next longest straight line after passing the first curve? What you call a reverse curve, you say?

A. Yes, sir.

Q. How is it when you first strike the curve? How does the road curve going north—to the right?

A. No.

Q. Curves to the left going north?

A. Yes, sir.

Q. Then curves the other way on the same curve?

A. Reverses. Curves first one way, then the other.

Q. Then strikes a straight line again?

A. Yes, sir.

Q. Well, how long is that straight line?

A. About two miles or two miles and a half.

Q. Is that the second straight line or tangent going north from Market Lake to Hawgood?

A. Yes, sir; I think it is.

Q. Wish you would state whether or not there are any cuts after this first reverse curve that you speak of.

A. Yes, sir; go through a sand cut that is in the curve.

Q. About how deep is that sand cut?

A. Oh, it is a deep one; about 10 feet, I should judge.

Q. Are there any cuts shortly after passing through the sand cut?

A. Yes, sir; after you get out on the straight line there is another cut.

Q. What is that other cut?

A. That is a rock cut.

Q. What is the character of the rock there?

A. Well, it is lava rock.

Q. About how far, as near as you are able to state, beyond this curve after you had got out on the second straight line that you were speaking of—the straight part of the road?

A. Mile and a half or so.

Q. You have already spoken of the night that you went up north on the morning of the 11th of December, 1885—on train 601, was it?

A. Yes, sir.

82 Q. And you have spoken of this lurch or jerk in the car. I wish you would state in which car on your train you were at the time that you observed that.

A. I was in the rear end of the first-class coach.

Q. Were you sitting down at the time?

A. Yes, sir.

Q. On which side of the car?

A. Right-hand side going north.

Q. That would be—this road runs north there—it would be on the east side of the car going north?

A. Yes, sir.

Q. On which side of the car, if you are able to state, was this bad joint or defect, or whatever it was, that caused this jerk?

A. Well, I was pretty positive it was on the side I was sitting on.

Q. That was your observation at the time, was it?

A. Yes, sir.

Q. Now, I wish you would take this pointer and point to the jury (stand round this way) about what point on that line, with reference to the sand cut, the curve, and the rock cut which you have described, after you had got out on the second straight line, this place was where you felt the jerk.

A. Well, this is what we call the reverse curve. When we strike this curve there is a sand cut here; the first curve. This is all sand, you might say, in this cut. Then you wind around this curve and come out and strike this straight line up around here, I should judge (illustrating).

Q. What is the mile-post marked there to which it is nearest?

A. Between 225 and 224.

Q. Between 225 and 224?

A. Nearly half way, I should judge.

Q. Now, I wish you would state, as near as you can, what the distance—how far it was—north of this curve that you call the reverse curve to the point where you felt the jerk.

A. Of course I can't state correctly.

Q. State as nearly as you can.

A. Well, I should judge it wasn't over three-quarters of a mile.

Q. Think you stated that you got up, did you, and looked out to see what place it was?

83 A. I attempted to raise the window, but failed to do it.

Q. Then what did you do?

A. I went to the forward end of the car and looked back.

Q. Wish you would state what you discovered there; what you

saw by which you could locate the place. Are there any familiar objects?

A. Well, there is a rock cut that we run through—that is, a through cut.

Q. Explain what you mean by a thorough cut.

A. A cut on both sides of the track.

Q. Well, where were you with reference to this through cut when you looked out of the car?

A. Well, I was on the other side when I looked out; passed through.

Q. Are you able to state positively whether or not it was that rock cut that you had in your mind that you then passed through?

A. Yes, sir; I am satisfied it was that cut.

Q. You have already testified to having made a report at Camas station and identified the report that you left there?

A. Yes, sir.

Q. Wish you would state to the jury whether or not there is any rule as to reporting distances of a defect in the track that is known to you and in use amongst railroad conductors.

Mr. HAWLEY: What is that question? I believe the purpose of this is to question the report. If that is the intention we object to it. The report is not ambiguous.

Mr. WILLIAMS: I want to prove the rule, if there is a rule, with reference to reporting the distance of the discovery of defects and the usage with reference to that and then whether he adopted it in this case, and I propose to ask him what his actual estimate was of the distance from Hawgood to the point of the defect that he discovered.

By the COURT: You may show it.

A. It is always customary to report anything short so as to make sure not to run into it.

Q. I wish you would state whether or not in this case this report that has been introduced here was made in accordance with that usage.

84 A. Yes, sir; I was satisfied it was over five miles, or I would have reported it four and a quarter or four.

Q. Wish you would state what your estimate was at that time of the actual distance from Hawgood to the point where you noticed this defect or jerk.

A. Well, I based my calculation on that—on this reverse curve—that is what I supposed it to be—for after striking that we came around and struck this straight line, and I knew about how far it was from Market Lake and Hawgood by that.

Q. Now, then, about how far was it?

A. We always considered it nearly half.

Q. What was your estimate at this time of the actual distance where you discovered this point from Hawgood in miles?

A. Well, I reported it five miles.

Q. Did you think it was that distance from there?

A. I was satisfied it was more than that.

Q. About how fast did you run that night between Market Lake and Hawgood, if you know?

A. Well, I don't think I was running more than 18 miles an hour there. After we got over the level part I don't think we would have made much over 18 miles an hour; not to exceed 20, anyway.

Q. You started late from Eagle Rock?

A. Yes, sir.

Q. Had you made up any time before reaching the point where you noticed this jerk?

A. Oh, I expect we must have made up 10 or 15 minutes' time since we left Eagle Rock.

Q. In your experience as a railroad man have you ever discovered broken rails by passing over them?

A. Yes, sir; found a great many that winter.

Q. I wish you would state whether or not, in your judgment, this jerk or lurch that you observed indicated a broken rail.

A. No, sir; I was satisfied it was not a broken rail, or else I would have stopped and left a flagman there to warn approaching trains.

Q. That you would consider your first duty?

A. We would have been compelled to do it. That is our first duty, to protect the lives of passengers.

85 Cross-examination:

Q. Was there snow on the ground that night?

A. Yes, sir; there was some snow on the ground.

Q. You say you discovered this injury to the track in a rock cut?

A. No, sir; just out of the rock cut.

Q. Just out of the rock cut?

A. Yes, sir.

Q. The cut there is a lava cut?

A. Yes, sir.

Q. Generally bears a similar appearance to rock?

A. Well, no; it is very rough and broken—uneven.

Q. Was it a dark night?

A. Not a black dark night.

Q. Was there any moon?

A. Well, I could not say whether there was a moon or not.

Q. You remember the ground was covered with snow?

A. Yes, sir.

Q. Now, you say, going north from Market Lake, the first curve is a left curve?

A. Well, it is a reverse curve.

Q. Curves one way, and then proceeds right the reverse to it?

A. Yes, sir.

Q. Curves to the left and then to the right?

A. Yes, sir.

Q. Isn't it first a right and then a left curve? Don't look at the plat.

A. This is something we don't study—whether it is right or left.

Q. Which way does the road here first curve?

A. Well, continues to the left coming out.
Q. Continues to the left—the first curve you come to?
A. Yes, sir.
Q. Next.
A. That one continues to the right.
Q. How is the next?
A. Then we come on the straight line.
Q. Then there is another curve? Look at the map.
86 A. Well, I think that leads around to the right.
Q. Well, that leads to the right; how as to the next one?
A. Well, I don't know as I can answer it, because I do not pay any attention to the way the curves run.
Q. As I understand, in running over the road you do not pay very much attention to those curves and particular locations?
A. Oh, yes; we have got to pay attention to locations.
Q. You should pay attention to the curves, ough-n't you?
A. We do; but not as to whether it is a right or left curve.
Q. Have you any particular recollection now as to the bearing of the track along there?
A. Well, I am satisfied, in my own mind, as to the curve lines of the track, but I can't exactly explain it as I understand it.
Q. You say you were running a little ahead of schedule time that night?
A. We were not allowed——
Q. (Interrupting.) Well, I understand you were making card time?
A. Yes, sir—that is, on the flat.
Q. You were running ahead on the——
A. Few minutes; not much. We wasn't allowed to exceed schedule time but very little at that time.
Q. Did you get any passengers at Market Lake going north that night?
A. No, sir; I don't think we did.
Q. What did you do first after looking from the train on the scene? First, did you have a good many passengers that night?
A. Yes, sir.
Q. Do you remember now whether you had any passengers from there that night?
A. I don't think we did. We had a good many passengers.
Q. After looking through the train what did you do next?
A. I came back and sat down in the rear end of the first-class coach.
Q. Came back and sat down in the rear end of the first-class coach? That would be the one next to the sleeper?
A. Yes, sir.
Q. What did you do then?
A. I sat there.
87 Q. What were you doing at the particular time when you passed over this bad place?
A. Well, I was—a person is always thinking about his business—of what concerns him.

Q. Do you remember what you were doing just at that time? Were you talking with anybody?

A. No, sir; I don't think I was.

Q. Well, do you recollect whether you were or were not?

A. I am satisfied I was not.

Q. You say that when you passed over this place you undertook to raise the window to see where the car was?

A. Yes, sir; I undertook to raise the window.

Q. You could not raise it?

A. No, sir; went out on the platform.

Q. You looked back then and saw that this place was by a rock cut?

A. Yes, sir.

Q. What do you term a through cut?

A. It is a cut on both sides.

Q. Did you look on both sides to ascertain?

A. No, sir.

Q. How can you tell—how can you tell at night whether this is a through cut or not?

A. By running through it; a man on a train will soon——

Q. (Interrupting.) Now, you say you reported this five miles from Hawgood?

A. Yes, sir.

Q. Did you know anything about the trains that were on the road that night further than your orders told you?

A. I don't understand what you mean.

Q. Did you know anything about what trains were running on the Utah Northern that night further than what you learned from the orders you received—running orders?

A. No; nothing, only what trains were scheduled to run.

Q. You never heard about any extra that might run?

A. No, sir.

Q. Have you seen those schedules that you——

A. (Interrupting.) No; I haven't.

88 Q. Do you remember what trains were scheduled to run—ought to run?

A. Well, as regard freight trains, they don't concern us, because they don't have any right over us.

Q. You have a right of way over freight trains?

A. Yes, sir.

Q. You had to look out for passenger trains?

A. Yes, sir.

Q. You were behind time. Were you running upon orders or were you running upon your schedule?

A. I was running on the schedule.

Q. Where did you get your orders to meet the other passenger?

A. I got them——

Q. Met them between there and the next telegraph station?

A. No, sir; met them between there and Beaver cañon.

Q. You don't know, then, anything about the trains that were following you?

A. No, sir; nothing outside regular scheduled trains.

Q. Do you remember anything now about what the schedule stated as to what trains were following you?

A. No; I could not be positive now; I don't think—I don't recollect; no, sir.

Q. Now, Mr. Farrell, as you stated that you reported this further south of Hawgood than it actually was, instead of further north of Market Lake than it actually was, was it your purpose to inform the dispatcher of the location of that defect so that he might locate trains on both sides of it and give them generally the distance in that dispatch?

A. Yes, sir; always notify them of such matters.

Q. How do you know what—did you ever see a copy of that message?

A. I expect I have.

Q. Well, did you in this instance?

A. No, sir.

Q. Isn't it true that the dispatcher when sending these warning orders would ordinarily state it about a mile short of what was reported to him, or generally sends the message irrespective of the bad report?

89 A. He sends them just the same.

Q. I understand you, then, that he reported this place nearer to Hawgood and further from Market Lake than it actually was. Isn't that true?

A. No, sir; I reported five miles east of Hawgood. I didn't take Market Lake into consideration at all; I was locating from Hawgood.

Q. You were aiming to locate it with a view to forwarding a dispatch, were you?

A. Yes, sir.

Q. For the purpose of warning all trains that might pass over that location?

A. Well, of course, it was for them all.

Q. How many rock cuts are there between Market Lake and Hawgood and how many through cuts?

A. Well, there is only about three of any size.

Q. How many is there all together?

A. Well, I don't think I could——

Q. (Interrupting.) Something like 20?

A. Oh, no; I don't think there is over 7—7 or 8. I would not be positive how many.

Q. There are, say, 7 or 8 all together?

A. Yes, sir.

Q. Three of these what would be termed large cuts?

A. Yes, sir.

Q. How many curves are there?

A. There must be 8 or 9.

Q. How many upgrades in going north?

A. Well, it is nearly all upgrade except when we get up on the Hawgood hill; then you go down into a sag.

Q. Then you go down into Hawgood?

A. Yes, sir; down the Hawgood hill.

Q. Then going north the whole line until after you get over the Hawgood hill is upgrade?

A. Yes, sir; except when you get on top of this hill, then you come to another hill and go down into a sag and then down into Hawgood.

Q. It continues, I understand, from this sand cut until you
90 get within a mile or a mile and a half of Hawgood—this is all upgrade?

A. Yes, sir; it is all upgrade; yes, sir.

Q. Mr. Farrell, can you tell us exactly what you were doing at the time you felt this jerk on your train?

A. I was sitting down.

Q. Well, what were you doing sitting down; were you doing anything; were you writing, making up your report; were you examining or checking your returns?

A. No, sir.

Q. Were you trimming your lantern?

A. No, sir.

Q. Well, what were you doing; anything else there?

A. Thinking about my business, of course.

Q. Well, what were you thinking about? Let us see; let us find out.

A. A person is always thinking about what relates to his business. I don't suppose I was doing anything but sitting there. I was observing everything in connection with my business, but I don't think——

Q. (Interrupting.) Well, do you remember distinctly where you were sitting?

A. Yes, sir; sitting close to the back end of the coach.

Q. Close to the back end of the coach?

A. Yes, sir.

Q. Do you remember who was sitting near you?

A. I don't think there was anybody sitting very near me.

Q. Did you get up and go forward into the sleeping car?

A. I think I got up and went into the smoking car. I got up and went forward and came back again.

Q. Do you remember having some conversation with Mr. Taylor and others about this bad place you had passed over?

A. No, sir; I do not remember speaking to Mr. Taylor at all about it.

Q. Do you remember their speaking to you?

A. No, sir; I don't remember anybody speaking about it.

Q. Don't you remember going into the other car and them speaking to you and you said you thought it was a broken rail?

91 A. No, sir; I don't think there was any conversation of that kind took place at all.

Q. You don't recollect?

A. Well, I am satisfied there wasn't.

Q. Do you remember who was with Mr. Taylor at that time?

A. No, sir.
Q. Do you remember Mr. Lingo being there?
A. I know Mr. Lingo.
Q. And Mr. Dash?
A. I know Mr. Dash also.
Q. Do you know Mr. Cogsdale?
A. No, sir.
Q. Mr. Rogers, of Eagle Rock? Mr. Rogers is now the justice of the peace at Eagle Rock.
A. I don't think I know him.
Q. Do you remember that you went into the car where these gentlemen were, and something was said to you about this place that you had just passed over on the track?
A. No, sir; I don't think I do.
Q. Was it a very common experience of yours at that time to find these broken rails?
A. Well, they were beginning to get very common.
Q. You didn't regard them as anything very extraordinary?
A. Well, I didn't regard this as a broken rail.
Q. Were battered joints also common?
A. There was a good many battered joints.
Q. And a good many broken rails?
A. Yes; there was a great many that winter.

Redirect:

Q. Wish you would state what the temperature of the weather was that night.
A. Well, it was a little cold; it was above freezing or below freezing, whatever you call it; worse than freezing.
Q. Colder than freezing—it was a cold night?
A. Yes, sir; a cold night.

92 Mr. O. A. FLANDERS called for the defendant:

Q. Since this accident have you observed the locality in which that wreck occurred?
A. Yes, sir.
Q. Have you observed it in connection with the mile-posts nearest?
A. Yes, sir.
Q. Also with reference to the curves of the road with which you are familiar?
A. Yes, sir.
Q. I wish you would look at this map, and, if you are able to from that, point out to the jury the place where this wreck occurred.
A. There is about the point (illustrating).
Q. Now, that is where with reference to the nearest mile-post?
A. That is something less than half a mile from mile-post 227.
Mr. HAWLEY: From what do you locate it? You say little less than half a mile from that—that is, in which direction?
A. South.

Mr. WILLIAMS: Wish you would state whether or not the half-mile posts are marked.

A. Yes; the half-mile posts are marked.

Q. How far was the point of the wreck from the half-mile post between 227 and 226?

A. Well, perhaps 200 yards.

Q. Which way?

A. North.

Q. Wish you would state whether or not there is any curve near by the place of this wreck.

A. There is a curve—slight curve—near mile-post 227.

Q. Had you passed that curve or not at the time of the wreck?

A. We had passed that curve.

—. ——?

A. Well, we were going on a down-grade, I should judge; it was down-grade, slightly.

Q. For about what distance had you been going down-grade?

A. Well, it is not—we had been going on a slight upgrade,
93 I should judge, by the lay of the road; perhaps we had gone some—I should think from near this curve.

Q. This curve you had just passed a short distance?

A. Yes, sir.

Q. You may also state to the jury how far that point is south of Hawgood siding.

A. It is a little less than four miles and a half.

Q. Did you, at the time of this wreck, yourself look to see which rail it was that was broken—on which side of the track?

A. No, sir; I didn't pay particular attention to it at the time.

Q. How long had you known the deceased, Mr. Palmer, by sight at this time?

A. Well, I could not say. I had met him several times on the train traveling back and forth.

Q. Do you remember how many persons were with him on that occasion?

A. Well, there was two traveling with him on the pass; three all together.

Q. Do you remember that pass so you would be able to identify it?

A. I think I would. I could not state the number now of the pass, but I think I have taken it a great many times.

Q. Was it a pass that you was familiar with?

A. Yes, sir.

Q. I wish you would look at that (handing witness pass) and state whether or not you recognize that.

A. I think I would.

Q. State, if you are able to, whether or not that was the pass that was presented to you at that time.

A. I think it is the same pass that was made out to Barraclough and six men.

Q. You remember that fact?

A. Yes, sir.

Q. Which of those parties, of the three, that were traveling together on the pass and presented it, if you remember?
A. The deceased had the pass.
Q. Mr. Palmer?
A. Yes, sir.
94 Q. You passed him and his companions on your train on this, did you?
A. Yes, sir.
Q. What was the character of the weather that morning as to temperature?
A. It was very cold and frosty.
Q. How did it compare, as to the intensity of the cold, with reference to the usual winter weather you had in that locality?
A. I should think it was a great deal colder.
Q. You have very frosty weather there at times, do you?
A. Yes, sir.
Q. But it was a frosty morning?
A. Frosty morning.
Q. About what time was it when this accident occurred, you say?
A. I could not state exactly; I think about 4.40 or 4.45.

Mr. WILLIAMS: We offer in connection the pass to be read to the jury.

Cross-examination:

Q. You say you do not remember the number of the pass?
A. I could not state now the number of the pass. I have got it on my books—train books that I used at the time. I believe I had the pass two or three times.

Mr. SMITH: We object to the introduction of the pass, if the court please.
By the COURT: Let me see it. What is the objection?
SMITH: That it is immaterial.

Mr. WILLIAMS: Ask you whether or not a pass in that form held by him entitled him to pass over the line of the road.

Mr. SMITH: We object to that question.
By the COURT: The objection will be sustained.
Mr. SMITH: I will state briefly what our objections are. Our objection to it is, in the first place, if the passes were issued by the defendant it would constitute no defence; in the second place, if it is not issued by the defendant it was issued by another company, and certainly the party riding upon it would be a passenger, if it were issued by some other company, and if it was issued by this company then it would be no defence in this case.
95 COURT: Objection sustained. Exception.

Mr. WILLIAMS: Have you a time-card with you of this road?
A. No, sir.
Q. Of the present time or of that time?
A. I haven't any time-pad—none at all.

MILTON RUSSELL sworn for the defendant:

Q. What is your business, Mr. Russell?
A. Locomotive engineer.
Q. How long have you been a locomotive engineer?
A. I have been running now—it lacks about three months of being four years.
Q. Where?
A. On the U. & N.
Q. Were you running an engine on the morning of the 11th of December, 1885?
A. Yes, sir.
Q. On the Utah Northern railroad?
A. Yes, sir.
Q. State what run you were on on that occasion; which way you were going and what train you were pulling.
A. I left Spring Hill on 602, going east.
Q. Going east? What day and time did you leave Spring Hill?
A. I forget the time we left there then. We left on the morning of December 11th. It was right after 12 o'clock, but I don't exactly know the time.
Q. Was that a passenger train?
A. Yes, sir.
Q. Who was conductor?
A. Flanders.
Q. Are you familiar with the line of this road between Market Lake and Hawgood?
A. Yes, sir.
Q. Have you looked at the plat which is exhibited there?
A. Yes; I have.

96 Q. Wish you would state to the court and jury whether or not that plat—that red line there drawn upon it—indicates, to your mind, generally the line of the road between those places.

A. Yes, sir; it does. It is a good plat, so far as I can see, of it. I don't see anything wrong; looks about like the appearance of the road as it is on the ground.
Q. Do you remember what time you arrived at Hawgood on the morning of the 11th of December, 1885?
A. No, sir; I can't state, because I left Camas late, a little late, and I wasn't making any over-schedule time. I didn't notice the time particularly when I passed Hawgood. I was a little late when I passed there, but I don't remember.
Q. It was nearly morning, was it?
A. Yes, sir.
Q. Before daylight or after?
A. Before daylight.
Q. What, if anything, occurred soon after leaving Hawgood?
A. A wreck occurred about four miles and a quarter east of Hawgood.

Q. I wish you would state to the jury particularly, in your own way, what first called your attention to the accident.

A. The first thing that called my attention was a jerk of the train and then a signal bell—that is, the cab bell.

Q. The cab bell?

A. Yes.

Q. Ask you to state what attachment there is, if any, between your cab bell and the train in the rear.

A. There is a cord that runs from the cab bell to the rear end of the sleeper.

Q. State what you did upon receiving this notice—when you first felt the jerk.

A. When I first felt the jerk I applied the break-s; then when the bell rung I set up the brakes, thinking the train was broke in two. I was rather excited and didn't notice that the train wasn't broke in two.

Q. What did you do with reference to stopping your engine when you found it wasn't broke in two?

A. I opened the engine up. I shut it off when I first felt the jerk; then I opened it up and run a car-length and a half from the wreck, and then walked back to the bridge and found the
97 cars in the ditch. I didn't think the train was in the ditch when I got off from the engine, because I saw the dull lights on the rear of the coach standing on the track, as I supposed——

Q. How many cars were off?

A. Four; the rear car was on.

Q. Was that a special car?

A. That was a special car.

Q. You may state whether or not you went to the point on the track where the wreck occurred.

A. I started; then I went back after I went around the train and seen there was nobody hurt (that was before Mr. Palmer was found). After I went round the train I seen in one car there was a lamp burning; I saw there was oil dripping from it and there was a little fire, and I went and put that out; then I walked back.

Q. What next? Did you find anything that you took to be the cause?

A. I found a broken rail—that is, there was a piece broke out.

Q. Which rail? Which side of the track?

A. Right side of the track going east.

Q. That would have been right-hand side or west side running north and south?

A. Nearly so.

Q. What was the character of the place where you found this broken rail as to the foundation—the road-bed—ground underneath?

A. Well, I should judge, from the place it was, it would be on the line of the lava. As far as I could judge, it was right in the lava cut.

Q. At which end of the cut—east or west end?

A. East end.

Q. Mostly a lava cut it is, as I understand?

A. Yes, sir.

Q. Did you notice whether the rail was broken more than once?

A. I could not say how many pieces it was. It was in two or three pieces; might have been more than three.

Q. About what rate of speed were you running at the time, as near as you can say?

A. I was making about 18 miles an hour.

98 Q. What was the grade at that place?

A. It was a little down-grade.

Q. Are you able to state about how far it was down-grade at the time of the accident?

A. It wasn't very far, because it was just around the curve. Well, if it is anything it is a little upgrade, but I ain't certain. I noticed after we get around it it is very nigh level.

Q. As you come around the curve?

A. Yes.

Q. Then from that curve down to the next curve it is a gradual slope—down-grade?

A. You might call it level.

Q. The descent, if any, is slight, you think?

A. Yes.

Q. State to the jury whether or not you observed any defect as your engine passed that point.

A. No, sir; I didn't.

Q. Not anything unusual until you felt the jerk or jar.

A. No, sir; none at all.

Q. Can you point out on this map about the point of—(stand around here to the end so the jury can see you.) You may point out the place that you think would indicate the point of this wreck on this map.

A. It occurred about here (illustrating).

Q. Where is it with reference to the nearest mile-post?

A. It is nearest to mile-post 227.

Q. About how far from that, and in which direction?

A. It is east. It lacks one telegraph pole of being half a mile; there was a half-mile post right east of it; about a telegraph pole distant between——

Q. (Interrupting.) You are positive about the locality of the wreck, are you?

A. Yes, sir.

Q. Looked at it since?

A. Looked at it pretty nigh every night since.

Q. I wish you would state whether or not as an engineer you have frequently received cautions as to bad places in tracks ahead of you.

A. Yes, sir; I have.

99 Q. Is there a general usage known to you as an engineer and used by other engineers upon receiving such notices as that as to the method of looking for the places? If there is you may state what it would be.

A. I don't exactly——

Q. (Interrupting.) You may state what the usage is.

A. Well, sometimes we get an order; sometimes we get a message. If the place is bad, why, we get an order; if it is just a place of caution we get a message to look out for it.

Q. In the case of getting a message of caution what do you do with reference to observing for the place?

A. Well, about the place where they say it is on the message—we go to the place as near as we can; then commence feeling for the place, expecting to find it on further; it is according to the way the grade is.

Q. Explain what influence the grade has upon it.

A. If the grade is down-hill of course we can run faster.

Q. Then in that case what do you do? You have to use more caution, be more careful, than if you were going upgrade?

A. If the train is going uphill you can go pretty nigh even to it, because we cannot make—cannot run very fast, not with a heavy train.

Q. You didn't receive any message on that morning, as I understand?

A. No, sir; I didn't.

Q. You have heard the message read here which Mr. Farrell identified, have you?

A. Yes, sir; I heard it yesterday.

Q. What is the distance to the point of this wreck south from Hawgood switch?

Q. Well, take it from the switch, it would be a little over four mile and a quarter; take it from the middle part of Hawgood to where the wreck occurred, it is just about four miles and a quarter, as near as I can figure it from the telegraph poles.

Q. You have estimated that distance with reference to the mile-posts, have you?

A. Yes, sir; at the time it happened there was no mile-posts up.

Q. They have been put up since?

100 A. Yes, sir; been put up since.

Q. If you had received the dispatch or message or report which Mr. Farrell made what would have been your action at the particular point where the wreck occurred?

Mr. HAWLEY: I object, if the court please.

The COURT: Objection is sustained. Exception.

Q. You remember the distance as indicated on your time-card between Hawgood and Market Lake?

A. It is ten miles, I believe; I am not certain, but that is what I call it myself.

Q. You are familiar with the distance?

A. Yes, sir; eleven miles from Hawgood to Camas.

Cross-examination:

Q. I understand as you came down on that grade that morning

you felt a jerk and immediately after you heard the bell—bell or gong, was it?

A. Yes; a gong.

Q. You understood there was something the matter with the train? By seeing the lights at the rear end of the train you supposed the train was still on the track; is that correct?

A. Yes, sir.

Q. It was a pretty dark night, wasn't it?

A. Well, a man could not see very far.

Q. You could not tell whether those cars were on the track or not?

A. No.

Q. Could you see the cars behind? What lights were they?

A. Green lights.

Q. You say you were about a car-length or a car-length and a half that you had pulled on?

A. Yes, sir.

Q. Did you ever run an engine over a broken rail?

A. I have run over them; yes.

Q. You say you have operated an engine about two or three years?

A. Yes, sir.

Q. And that there were no-mile posts at this place at the time?

101 A. No, sir.

Q. How long had you been running then?

A. Two or three years.

Q. Had you run then any in the daytime?

A. Yes, sir; been running little by day; mostly in the night.

Q. Well, now——

A. (Interrupting.) I had just went on the passenger train, but I had been on day and night both, on freight trains.

Q. How long had you been running on a passenger train?

A. I had commenced to pull the passenger train just previous to the time before Palmer was killed.

Q. You had been on there but a few days then?

A. Yes, sir; a few days.

Q. What time did you say you were making?

A. About 18 miles an hour.

Q. You were a little late?

A. A little late; yes.

Q. When you are a few minutes late that way it is your object to make up time as quickly as you can?

A. No, sir—that is, if a man has started out 20 minutes late or if he goes out ahead of time if he can get into the home station in time that is all that is necessary.

Q. You started out of Camas about 20 minutes late, I believe, and your home station was Eagle Rock. Now, it was your purpose to make up time between there and Eagle Rock. How far is that?

A. Thirty-eight miles.

Q. You calculated to gain something about half a minute on each mile?

A. Somewhere along there.

Q. According to your schedule? Just describe this jerk of your engine, Mr. Russell.

A. Well, it was—I don't think I could explain it particularly.

Q. It was unexpected to you?

A. It was unexpected.

Q. You were somewhat excited at the time, were you?

A. I didn't know hardly what was wrong.

Q. You were not accustomed, you say, to pulling passenger trains?

A. No.

102 Q. Was this your first wreck on a passenger?

A. Yes, sir; and the last.

Q. The first time you had run one in your life?

A. Yes, sir.

Q. Have you been on a wreck on a freight train?

A. I have had cars off the track.

Q. Did you ever have one of your cars in the ditch, Mr. Russell?

A. Sometimes had a car derailed on a freight train. I seen a couple of them turn over one time on their side.

Q. Who was your fireman at that time?

A. Rees Jones.

B. T. LLOYD called for defendant:

Q. Mr. Lloyd, have you looked at this plat that is before you?

A. Yes, sir.

Q. Ask you to state whether or not that represents the track between those two points or the portion of it that you are familiar with, passing from about Market Lake to the north end of your section.

A. Yes, sir.

Q. I wish you would indicate upon that plat, if you can do so, with reference to the curves at the north end of the section at the time you have spoken of.

A. Somewhere near right there (illustrating).

Q. You mean the curve there that you point to, in section 29, is it?

SMITH: What is that?

Q. Section 29.

A. Yes.

Q. Then it is near the boundary line between section 20 and 29 that you indicated?

A. I don't know anything about the section lines there. I know the curve.

Q. You know the curve?

A. Yes, sir.

103 Q. What mile-post is nearest to the point where you marked there?

A. I can give you the mark here. I don't know what the miles were then—228.

Q. It is a little south, then, of 228?

A. Yes, sir; it is just around on the north side of this curve.

Q. Now, from the way the line is delineated there, can you indicate about the point where this wreck was?

A. Yes, sir.

Q. You may do so, if you please. Now, what do you locate that——

A. (Interrupting.) Locate that by this slight curve right——

Q. (Interrupting.) It is a little south of that slight curve?

A. Yes, sir.

Q. Now, what mile-post do you find nearest to that point?

A. Two hundred and twenty-seven.

Q. You fix the point, then, little south of 227?

A. Yes, sir.

Q. What time was it on that morning that you got to the scene of the wreck?

A. Well, I can't give the exact date; it was somewhere between 5 and 7.

Q. And you went from that point of the wreck to Market Lake station? Who brought notice to you of the accident?

A. Mr. Flanders.

Q. When he got in with his train?

A. Yes, sir.

Q. Do you remember what time it was then?

A. No, sir.

Q. What did you do immediately on receiving that notice?

A. Why, when he came in, of course, he woke me up, and says, "You men had better go out and fix the track, there is a train in the ditch." So we got the men together what was there and went over and got the hand car and a couple of rails and some ties and proceeded to the scene as soon as possible.

Q. How did you get to the scene; did you pump the hand car or push it?

A. Pushed it most of the way.

104 Q. What was the character of the weather as to temperature that morning?

A. Well, it was pretty cold.

Q. Frosty weather?

A. Yes, sir.

Q. You may state whether or not you examined the ends of this broken rail at the time when you went to the wreck—after the wreck.

A. Yes, sir; we did.

Q. On that first visit to the scene?

A. Yes, sir.

Q. Did you examine them at the time you wrote out this report for your father, the foreman?

A. Yes, sir.

Q. Wish you would describe to the jury what the appearance of those broken ends were.

A. Do you mean whether they were broken squarely off?

Q. Yes; and whether it appeared to be a fresh break or old?

A. It appeared to be a fresh break; they broke nearly square off.

Q. That is, the ends presented that appearance?

A. Yes, sir; as near as I can remember.

Q. Do you remember discovering any old flaw, or partial break, appearing on any of the breaks?

A. No, sir.

Cross-examination:

Q. How far south of this little curve, Mr. Lloyd, was this wreck?

A. It was about 200 yards, as near as I can remember; probably a little more—something over 200 yards.

Q. Do you remember the telegraph poles?

A. No, sir; I don't remember them.

Q. Something like 600 feet, then?

A. Yes, sir.

Q. What kind of ground was this broken rail—that is, what was the bed there; did the road——

A. (Interrupting.) The road was running through a lava cut—rock cut; of course the ties were imbedded in dirt in the cut.

105 Q. Were imbedded in dirt in the cut?

A. Yes, sir.

Q. What is this—what is the term "through cut" in railroad talk?

A. That is a cut on both sides.

Q. What kind of a night was that, do you remember, as to its being dark?

A. I don't remember anything about the night.

E. FANNING sworn for the defendant:

Q. What is your business, Mr. Fanning?

A. Road-master.

Q. What duties belong to that position?

A. The duties is to see that the road is in repair and keeping it in repair.

Q. How long were you engaged in that capacity in December, 1885?

A. A year ago last December I was road-master of the Utah Northern.

Q. What was your division?

A. From Pocatello to Spring Hill.

Q. Did that include the place where the wreck occurred on the morning of the 11th——

A. (Interrupting.) Yes, sir.

Q. In which Mr. Palmer lost his life?

A. Yes, sir.

Q. How long have you been familiar with track-work on railroads?

A. For about 15 or 16 years.

Q. Has that been your regular employment?

A. Yes, sir.

Q. In what capacity first?

A. First as a laborer and then as a section foreman.

Q. How long have you been a road-master?

A. About four years and a half on this road, I think, and on the Short Line.

Q. Were you at the scene of this wreck the day it occurred—
106 that is, it occurred early in the morning—were you at the scene of the wreck that day?

A. Yes, sir; went there the next morning.

Q. What time in the morning?

A. I think I left Eagle Rock on the 7 o'clock train.

Q. Did you proceed to the place with the engineer on the train going north? Do you remember now about what time you arrived there?

A. I should judge about 9.30 or 10.

Q. Were there other parties on the ground?

A. Yes, sir; some.

Q. Who were they?

A. I believe the section foreman was there—Mr. Lloyd was section foreman at the time—and some other men.

Q. In your judgment, what was the temperature that morning?

A. It was very cold that morning.

Q. Frosty weather?

A. Yes, sir.

Q. In the course of your experience with iron rails and other iron have you ever had any experience with or observed the effect the frost has upon iron as to its liability to break when it is very cold?

A. Yes, sir; it has a tendency to break then.

Q. You have noticed such things, have you, in your experience?

A. We always have more broken rails in the winter time than the summer.

Q. That is attributed to what?

A. Cold weather and frost.

Cross-examination:

Q. Mr. Fanning, what was this track—was it iron or steel at that time?

A. It was iron.

Q. What is it now?

A. Steel.

Q. Does the frost break this iron or is it the cars passing over them?

107 A. It has a tendency—the cars passing over them and the cold besides.

Q. Well, did you ever know an instance where the frost itself has broken the iron—broken a rail?

A. I have known the tendency that the frost has—the rails bear less—the joints spread.

Q. Do you know an instance where the frost has broken a rail?

A. It may not break a rail itself.

Q. The frost simply contracts the rail and leaves the joint more open?

A. Yes, sir.

Q. Did the frost break this rail, Mr. Fanning?

A. Well, that is a question I can't answer, whether the frost broke it or not.

Q. What kind of rail was it, as to size?

Mr. WILLIAMS: I object to that question; that is not cross-examination, under the question involved in the issues in this case. I object to it as irrelevant, immaterial, and not cross-examination.

By the COURT: Objection is overruled. Exception.

Q. Now, what was the size of this rail Mr. ——?

A. The iron was 35-pound iron.

Q. It was 35-pound iron—iron rail—35-pound iron?

A. Yes, sir.

Q. What was the weight of the engines and cars you were running over?

Mr. WILLIAMS: I object to that as not being cross-examination, and it is irrelevant and immaterial in the issue presented in this record.

Mr. HAWLEY: We insist that it is proper cross-examination. We propose to show that the rail was no account and would break by running extraordinary trains over them. I think it is proper cross-examination.

Argued by counsel.

By the COURT: I do not understand that it is claimed on the part of the prosecution that they wish to prove the negligence or anything of that kind. It must be confined, of course, to any particular break, and anything that will explain that, I think, is competent. The witness having been called as a witness to-day, I think the cross-examination of that is usually allowed. While, of course, it must be confined to the particular break, and the negligence confined principally to the particular cause of the negligence, I think the matter should be regulated by the instructions to the jury.

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Objection overruled. Exception.

A. I expect the engine was about 35 tons. I guess, probably, about 35 tons; something over.

Q. I understand you the rail was 35 pounds. You mean 35 pounds to the yard in length?

A. Yes, sir.

Q. A rail will weigh 35 pounds to each yard in length?
A. Yes, sir.
Q. You say you examined this rail on the morning it was broken?
A. No, sir; I didn't say so. I saw the rail there when I was picking up the cars, but something went wrong and I had to go away from the rail.
Q. You know the size of that rail?
A. Yes, sir.
Q. It was one of the 35-pound rails?
A. Yes, sir.
Q. Can you tell how long it had been broken?
A. I can't tell exactly how long it had been broken.
Q. What kind of a rail did you put in the place of it?

Mr. WILLIAMS: I object to that as being irrelevant, immaterial, and not cross-examination.

COURT: What is the purpose?
Mr. HAWLEY: We mean to show whether or not they were negligent in permitting this rail to remain.
COURT: I cannot permit it for any such purpose as that.

Objection sustained. Exception.

Redirect:

Q. Mr. Fanning, didn't I understand you to say in your direct examination—you may state now whether or not you did make any special examination of those broken surfaces?
A. I remember seeing them at the time, but I can't remember whether I made any examination of them at the time or not.
Q. Think you didn't examine them on the surface?
109 A. No, sir.

Mr. BARRACLOUGH called for the defendant:

Q. How long had you been acquainted with Mr. Palmer at the time of his decease?
A. In the neighborhood of five years, I believe.
Q. When did you first become acquainted with him?
A. He was working on the road when I first came on the main line, in 1881. That was the first I saw him, in November, 1881.
Q. On which road was he working?
A. On the Utah Northern.
Q. State whether or not you and he were in the same department generally from that time to the time of his death.
A. Yes, sir; he was in that department constantly.
Q. What different roads did you work on during that time?
A. On the Utah Northern exclusively.
Q. On the Utah Northern exclusively?
—. ——.
Q. Do you remember of his being out of employment for any time and returning?
A. No, sir.

Q. Do you remember of his being laid up once with a sprained ankle or something?

A. I remember of his being off with a sprained ankle, but whether it was his intention to quit the road I could not say.

Q. Do you remember about when that was?

A. It was some time in January, 1885, I believe.

Q. That would be the early part of this same year in which he lost his life?

A. Previous to that. Must have been in January, 1884.

Q. Do you remember how long he was laid up at that time?

A. I could not say.

Q. Was Mr. Palmer at any time foreman of a gang in the bridge department?

A. Yes, sir.

Q. Do you remember what period he was so employed?

A. I believe it was in 1883.

Q. You remember the fact, do you?

A. Yes, sir.

110 Q. Can you state now, from your memory, how long he was so acting?

A. I know he was acting part of two quarters, if not all; possibly more, I could not say.

Q. I wish you would state whether or not he was on the occasion of this accident in which he lost his life—do you know where he was going on that occasion?

A. Yes, sir.

Q. You may state where to.

A. He started from Camas to go to McCammon.

Q. By whose direction?

A. By my direction.

Q. For what purpose?

A. He was going down to put up a cattle schute.

Q. Was that sort of work included in your department?

A. Yes, sir; that was in my department.

Q. A cattle schute is a place for loading cattle in the cars?

A. Yes, sir.

Q. Who, if any men, were detailed to accompany him by you?

A. There was two men with him by my instructions.

Q. Who were they?

A. J. B. Fleming and E. Blanchard.

Q. They were men belonging to your gang of bridge-builders—laborers?

A. Yes, sir.

Q. Where were you at the time they left Camas?

A. I was at Camas.

Q. Where was they at the time?

A. At Camas.

Q. Did you rise on that morning to see them off?

A. No, sir; I had been there for some time, possibly a couple of weeks.

Q. What say?

A. I had been in Camas possibly two weeks.
Q. Did you rise that morning to see them off?
A. No, sir; I called them, but I didn't get out of bed.
Q. What did you do with reference, if anything, to providing transportation for those parties?

111 Mr. SMITH: We object. The objection is that it is immaterial whether he did or not.
By the COURT: Objection is overruled. Exception.

A. I gave them a pass provided for that purpose.
Q. To whom did you give the pass?
A. Mr. Palmer.
Q. Who was put in charge, if any one, of the party that went along?
A. I gave him instructions of the work that was to be done.
Q. Would you recognize the pass that you provided?
A. I believe so.
Q. I hand you this paper; see if you recognize it.
A. Yes, sir; I recognize it.
Q. That is the same one?
A. Yes, sir; the same.
Q. I wish you would state, if you know, whether or not Mr. Palmer when he was acting as foreman ever received any pass for a similar purpose in his own name.
A. Yes, sir.
Q. How came you to be familiar with that fact?
A. Because I issued them to him.
Q. In what capacity were you working at the time he was boss of a gang?
A. I was in a position over him.
Q. As assistant superintendent at the time?
A. Assistant superintendent of bridges and building.
Q. Do you know whether or not the passes that were issued to him were all in the same form as this?
A. Yes, sir; the same, sir.
Q. What do you say with reference to the matter as contained on the back and front; whether that was the same upon the pass that he had delivered to him?
A. There might have been a little variation in the form, but the purport of it is about the same.
Q. Have you been familiar with this form of pass for some time?
A. Yes, sir; in the habit of using them.
Q. At the time of Mr. Palmer's death, I wish you would state whether or not at that time you were acquainted with the
112 Union Pacific Railway Company, a corporation, or knew of such a company.
A. Yes, sir; it was understood that we were working for that company.
Q. Was that the fact that you were at that time—you and the men under you were—working for the Union Pacific Company—

that is, paid by that company? Was that true with reference to Mr Palmer?

A. Yes, sir.

Q. State, if you know, whether or not at the time the Union Pacific Railway Company was running and operating the Utah Northern Railway.

Mr. SMITH: We object to the question. Our objection is that it is immaterial and incompetent.

By the COURT: The objection is sustained. Exception.

Mr. WILLIAMS: If your honor please, at this point I ask leave to amend the answer in this case for the purpose of so framing the issues as will agree with the testimony which I now offer in evidence, the testimony which has just been excluded. I ask to be permitted to amend the answer of the defendant on file herein by denying that the defendant railroad company was operating the Utah Northern Railway Company at the time of this accident, and also to state, further, that at the time this railroad was being operated by the Union Pacific Railway Company, a corporation, and that at the time of such accident and prior thereto the deceased was in the employ of the Union Pacific Railway Company, working upon the Utah Northern road as a servant of the Union Pacific, which was operating it, and all the matter that was set up upon the former application to amend the answer in this case, the amended answer being marked by the clerk for identification. I refer to that for the particular matter which I desire to amend, so that the issues in this reformed answer would present the question which I now offer.

Argued by counsel.

Mr. SMITH: If the court please, our objection is to the question; and their effort to amend, we object to that also.

By the COURT: The objection will be sustained. I understand this raises the same question that was raised the other day.

Mr. WILLIAMS: I understand the application is denied.

COURT: Yes, sir.

113 Mr. WILLIAMS: I take an exception.

Q. Do you know, Mr. Barraclough, how long, if at all, the Union Pacific Railway Company had been operating and running the Utah Northern road at the time of this accident?

Mr. SMITH: I object.

By the COURT: Objection sustained. Exception.

Q. On what different lines—first, how long have you been in the employ of the Union Pacific Railway Company?

A. I have been 11 years on the 28th of September next.

Q. On what different roads have you worked while in this employ?

A. On the main line of the Union Pacific——

Q. What is that?

A. From Ogden to Omaha.

Q. What other lines?
A. On the Utah Northern.
Q. Those two were the only——
A. (Interrupting.) Yes, sir; those two.
Q. By whom was Mr. Palmer and the other men engaged under you paid, at and prior to the time of his death, for their work?

Mr. HAWLEY: We object as irrelevant and immaterial.
Mr. WILLIAMS: I insist upon it.
By the COURT: He may answer.

A. They were paid by the Union Pacific from January—let's see, from November, 1881; prior to that I could not say, as I hadn't been on this road.
Q. That was the beginning of your acquaintance here, was it?
A. Yes, sir.
Q. During all that time up to the day of his death they were so paid?
A. Yes, sir.
Q. By what means was payment usually made?
A. Part of the time they were paid in cash from the pay car; part of the time in checks.
Q. State, if you know, who was paymaster that accompanied the pay car during the time they were paid by cash from the pay car.
A. S. T. Josselyn, I believe, was paymaster for a number of years, when he came out over the road.
Q. What office was his headquarters?
114 A. Omaha.
Q. He was paymaster of what company?
A. Union Pacific Company.
Q. Subsequently they were paid by checks?
A. Yes, sir.
Q. Was that the method that was in vogue at the time Mr. Palmer lost his life?
A. Yes, sir.
Q. How long had that been in vogue?
A. I could not say definitely.
Q. Some time before that?
A. Some time before that.
Q. Whose checks were they?
A. Union Pacific checks.
Q. Signed by whom?
A. Signed by Josselyn, Union Pacific paymaster.
Q. What time, if you know, according to the regular schedule time for the running of the trains at that time, would Mr. Palmer have reached the point of destination on this occasion?
A. I could not say definitely, but somewhere about 9 o'clock, I think.
Q. In the morning?
A. Yes, sir.
By the COURT: According to the regular schedule as it was then?
A. Yes; as it was then.

Q. State, if you know, whether it was later than the hour of seven in the morning?

A. I think they would; yes, sir.

Q. Who kept time on your line—reported time?

A. I kept time myself.

Q. In a case such as that that occurred on that morning, when a man was traveling to a place to work from your gang—any one or a number of them—I wish you would state to the jury whether or not any deduction in time was made from his earnings by reason of his not commencing work at the usual hour.

A. No, sir; we work on the principle that being on the road was to make up the allotted time in hours. I don't remember what time we would consider it or we would give him.

115 Q. Just considered it from the time he was away?

A. Yes, sir; when he was on business for the company.

Q. When he was on business for the company—would that be so when he might be occupied the entire day in traveling to a point where he was going to do the next work?

A. Yes, sir.

Q. So that no deduction was made for hours lost in traveling from one place to another, provided they were going on business for the company?

A. No, sir.

By the COURT: Where did I understand Mr. Palmer was going that morning?

A. Out to McCammon.

Cross-examination:

Q. I understand, if you sent a man to work this way, you allowed just 10 hours a day while they were gone. Is that correct?

A. Yes, sir; 10 hours a day, counting one ten hours in each 24.

Q. Counting one 10 hours in each 24? Did you pay Mr. Palmer for the 11th of December?

A. I could not say.

Q. What is your recollection about it?

A. That I could not say, whether I did or not. I usually set the time down at night. I might have put in for that day and might not. I could not say.

Q. Now, I understand they were working down there building a cattle schute. If they worked overtime or lost a day's time you simply allowed them 10 hours a day?

A. They weren't supposed to work overtime.

Q. If they did you would not pay them anything extra; that is correct, is it?

A. That is correct, unless they had instructions to work overtime.

Q. Did they work overtime without instructions?

A. I don't think they did.

Q. Well, do you know anything about it?

A. I could not state when they was away from the outfit.

116 Mr. WILLIAMS: Did you ever have any complaints of your men working overtime when they were away from you?

No answer.

Mr. WILLIAMS: Upon the testimony of Mr. Barraclough upon the pass, I beg leave to offer it again. I offer this pass in evidence.

Mr. SMITH: We object to it for the same reason—as being immaterial.

By the COURT: Objection sustained. Exception.

Mr. WILLIAMS: I ask, if your honor please, that the clerk identify it by some mark that may be used if necessary.

Marked for identification.

The said pass so offered in evidence was in the words and figures following on the front, viz:

Countersigned by S. T. SMITH, *General Superintendent.*

D 1619

UNION PACIFIC RAILWAY.

Employés' Time Pass.

Pass G. W. Barraclough and six men between all stations on Utah & Northern, on Idaho Division. Account Bridge Gang. Until December 31st, 1885.

Not good unless countersigned by S. T. Smith, General Superintendent.

S. R. CALLAWAY,
General Manager.

Not Transferable.

And on the back or reverse side was the following, to wit:

"*Conditions.*

In accepting this free ticket I assume all risks of accident, and expressly agree that the Union Pacific Railway Company shall not be liable under any circumstances, whether of negligence by their agents or otherwise, for any injury to my person or for any loss or damage to my property while using this ticket.

G. W. BARRACLOUGH.

The above agreement must be signed, and if this pass is presented by any other person than the individual in whose
117 name it is issued, or if altered by erasures, additions, or interlineations, the conductor will take up this ticket and collect fare. In case questions arise between conductors and the holder of this pass as to its validity or the right of the bearer to use it the conductor will take this up, collect fare, and refer the case by telegraph to the person who issued it. 1885."

J. M. BENNETT sworn for the defendant:

Q. Mr. Bennett, what is you- business?

A. Supervisor of bridges, buildings, on the Idaho Division of the Union Pacific railway.

Q. What does the Idaho Division include?

A. The Oregon Short Line and Utah Northern Branches.

Q. How long have you been in that position?

A. About 15 years.

Q. I understand you to say you have been in that position on the Idaho Division that long?

A. Not in the division. I began in the bridge department as division superintendent and part of the time in the building department. Then bridges were added onto it, and it was called bridges and buildings.

Q. You have been engaged in that same general business on the Union Pacific Railway Company for 15 years?

A. Yes; operating on these roads first and last. I commenced on the main line, what is known as the main line, from Omaha to Ogden; then on different branches—on the Colorado Central Branch.

Q. When did you come to the Idaho Division?

A. The Idaho Division has only been known since the Oregon Short Line was built; before that it was known as the Utah Northern Division. I came on that in 1879; that was the time it was being constructed.

Q. You say it was after the building of the Oregon Short Line that it was called the Idaho Division?

A. Yes, sir.

Q. Did you know Mr. Palmer in his lifetime?

A. Yes, sir; I have seen him.

Q. Met him at his work?

A. Yes, sir.

118 Q. Knew him or knew of him?

A. Yes.

Q. Do you remember of him acting as foreman of a gang?

A. He was acting foreman for some time.

Q. Do you remember now who appointed him to that place?

A. Well, Mr. Barraclough appointed him.

Q. What position was he acting in then?

A. He was assistant under me at the time.

Q. He was assistant superintendent?

A. Yes.

Q. He generally appointed a man foreman?

No answer.

Q. I wish you would state who the general managing officers are of the Union Pacific Railway Company.

Mr. SMITH: We object. Our objection is that it is immaterial. What difference does it make?

By the COURT: Objection will be sustained. Exception.

Q. Wish you would state whether the general managing officers

of the Union Pacific railway are as such general managing officers of the Utah Northern railway.

Mr. SMITH: We object to that question.
No ruling by the court.

A. Yes, sir.

Q. State, if you know, whether they are such by virtue of their offices under the Union Pacific Company?

A. That is the way I understand it.

By the COURT: State what you know. If you don't know of your own knowledge you cannot say so.

A. I know they are the general officers of the Utah Northern Branch.

Mr. SMITH: Do you know the same men are?

A. Yes, sir; the same men.

By the COURT: I think the witness knew they were.

WITNESS: Yes, sir; I say I know they are.

By the COURT: You know they are by virtue of their offices, that they are managers of this Utah Northern also.

Mr. WILLIAMS: Is there any general manager of the Utah Northern railway so denominated?

A. No, sir; there is no officer of that title.

119 Q. Where are the headquarters of the general officers who have control of the management of the Utah Northern railway?

A. Omaha, Nebraska.

Q. Do you know whether or not the Union Pacific Railway Company is operating and running the Utah Northern railway?

Mr. SMITH: We object to that as irrelevant.

A. Yes, sir; the Union Pacific is operating——

Mr. SMITH: We will ask to have the latter part of that answer stricken out.

By the COURT: Strike it out except the answer: "Yes, sir."

Q. State, if you please, whether or not the Union Pacific Railway Company is running and operating the Utah Northern.

Mr. SMITH: We object to that.

Mr. WILLIAMS: We insist upon it.

By the COURT: The objection will be sustained. Exception.

Q. State, if you know, whether or not the Union Pacific Railway Company was running and operating the Utah Northern upon the 11th day of December, 1885, and prior thereto and up to that time.

Mr. SMITH: We object to that question.

By the COURT: Objection sustained. Exception.

J. B. FLEMING sworn for the defendant:

Q. Where do you reside now, Mr. Fleming?

A. Well, I have been residing for the past few weeks in Oregon.

Q. Where were you on the 11th of December, 1885?

A. I was working for Mr. Barraclough at that time.
Q. The gentleman who has been on the witness stand?
A. Yes, sir.
Q. Do you mean working for him or working under him?
A. Yes, sir.
Q. Did you know Mr. Palmer in his lifetime?
A. Yes, sir; I had a short acquaintance with him.
Q. How long had you known him?
A. Just the day I went to work for Mr. Barraclough.
Q. Did you work with the same crowd or gang of men with which Mr. Palmer worked?

120 A. Yes, sir.

Q. State whether or not you were with him on the occasion of his death.
A. Yes, sir.
Q. What were you going to do on that occasion?
A. We were going to put up some stock yards at McCammon Junction.
Q. Who constituted the party that was going for that purpose?
A. Myself, Mr. Blanchard, and Mr. Palmer.
Q. Who was in charge of that party?
A. That I do not know.
Q. You were not instructed to direct affairs?
A. No, sir.
Q. Who carried the transportation?
A. Mr. Palmer.
Q. He carried the ticket or pass and presented it?
A. Yes, sir.
Q. Where did you get on?
A. Got on at Camas.
Q. About what time was that in the morning?
A. I don't know just exactly.
Q. About what time, then, were you in the train at the time of the accident—between three and four o'clock?
A. I don't think it was. I would not be positive as to the time.
Q. You had been in bed and asleep, hadn't you?
A. Yes, sir.
Q. You remember, of course, the accident did occur?
A. Yes, sir.
Q. Where were you—where was Mr. Palmer just previous to the accident?
A. We were sitting together perhaps three or four minutes before it occurred.
Q. In what car—were you sitting in the smoking car?
A. I think it was in the first-class coach; I disremember which now; I think it was the smoking car.
Q. Was Mr. Blanchard also with you there?
A. Yes, sir.

Q. Do you remember where you last saw Mr. Palmer or
121 what he was doing just previous to the accident? If you do you may state.

A. Well, just a few minutes previous, before this, he took off a pair of felt boots he had on. He said they were getting too warm for him, so he pulled them off, and I think he laid them up in a rack on the side of the car.

Q. Did he stand up for that purpose?

A. Yes, sir.

Q. When was that with reference to the tipping over of the car?

A. About a minute, probably.

Q. Was that the last you saw of him before the accident?

A. No; I saw him again. I got up and moved about three or four seats forward of where he was. He was sitting this way next to the window. I was sitting on the west side—facing, not exactly facing, him—of the car. That is the last I noticed of him.

Q. What did you do after the accident?

A. Well, I don't know what you mean after the——

Q. (Interrupting.) What was the next thing that you did, that you remember?

A. Well, I remember two or three things while the car was going over that I was trying to do—to accomplish; one was that I was down against the stove at one time, and I got out of that position, I suppose, by the moving of the car; I wasn't in that position but a very short time, because it wasn't a very desirable one.

Q. When did you discover first that Mr. Palmer was killed?

A. Well, I didn't discover that he was killed until I found him.

Q. Did you find him in his position under the car?

A. I believe I did. I believe I was the first one that got there.

Q. What, if any, service did you perform after that?

A. Soon after I went out to flag a train that was coming south.

Q. Freight train that was following you?

A. Yes, sir.

Q. At whose request, if any person's, did you do that?

A. Conductor of the train.

Q. Mr. Flanders?

A. Yes, sir.

Q. You took a lamp and went back, did you?

122 A. Yes, sir.

Q. How far did you go back?

A. Well, I expect I went back about a mile and a half; probably farther. I was walking, I remember, more than anything else.

Q. What was the temperature that morning?

A. Well, I don't know; it was very cold; I could not say.

Q. Sharp, frosty weather?

A. Yes, sir.

Q. You came back that night, I suppose?

A. Yes, sir; yes, sir; I came back on the train I flagged.

Q. How long after you returned before you started on for Eagle Rock; after you returned to the point of the wreck?

A. Oh, it was probably an hour and a half. I don't know how long.

That is all.

Mr. WILLIAMS: If your honor please, I desire to offer in evidence a table of annuities, which, I take it, the court will take judicial notice of; if not, I will have Mr. Smith sworn on this point.

Mr. SMITH: I think it is admissible under our statute.

By the COURT: Is it a book of science?

Mr. WILLIAMS: Yes, sir.

By the COURT: My recollection, gentlemen, is that books of science can be properly admitted in evidence.

Mr. WILLIAMS: I offer it in testimony for the purpose of referring to it in argument to the jury. It is on page 312, Ray's Higher Arithmetic.

Mr. WILLIAMS: I have, if your honor please, this proposition under the statute, to move the court for an order authorizing an officer to go with the jury and with a witness who knows the point of this wreck, and also with Mr. Farrell, to point out the places that he will designate and point out to the jury and to discover this place of the defect in the track, and will say that we will furnish an engine and car, without any charge therefor, and send a conductor along to look after the operating, and let the jury to-morrow morning proceed to the place of the wreck. It will not take a great while, and I make that motion to the court. It comes under a provision of the statute.

By the COURT: I understand the statute. I think it is rather in the discretion of the court.

123 Mr. SMITH: We have no objection to the jury going there, but we object to one of their witnesses going there.

By the COURT: I think that this jury will understand the facts very well, and you have had an opportunity of bringing your map in showing the distances and everything, and I do not think it will be adding much by going upon the ground. I think I will have to deny the motion. Exception.

Mr. WILLIAMS: I offer this diagram in evidence and ask that it be marked as an exhibit.

Diagram received in evidence, marked Exhibit "3."

Defendant rests.

B. T. LLOYD recalled for plaintiffs:

Q. Mr. Lloyd, you heard the testimony of Mr. Farrell and Mr. Taylor in relation to the jerking of the train on the night of the 10th going north?

A. Yes, sir.

Q. You say you were accustomed to passing over the division between Market Lake and a point north of the wreck every day?

A. Yes, sir.

Q. Previous to the 11th?

A. Yes, sir.

Q. Pass over it on the 11th?

A. Yes, sir.

Q. Over the entire section?

A. Yes, sir.

Q. Was there any joint, what is termed a bad joint, upon that

section that would have caused any such action on the part of a train?

Mr. WILLIAMS: I object to that as not being rebuttal. It is testimony-in-chief.

By the COURT: This is the gentleman that was run over in a hand car. He was examined in cross-examination, I think.

Mr. WILLIAMS: The direct examination will show substantially this question, which was asked by my brother.

Q. You say you passed over this section on the day following this wreck?

A. Yes, sir.

Q. Did you upon that day observe any joint on that sec-
124 tion that would have occasioned such a lurch or would have caused such a jerk as was testified here to by Mr. Farrell?

Mr. WILLIAMS: I object to that.

By the COURT: I think it is objectionable.

Mr. SMITH: I will change the question.

Q. Did you observe any joint upon that section upon that day, the day succeeding the wreck, that was in such a condition as would have attracted special attention, or would cause an unus-al lurch of a train passing over it?

Mr. WILLIAMS: I object to the question. I object to it, first, for the reason that it is not rebuttal of anything that was brought out by the defence; second, that it is the same matter which belonged to the subsequent time to which he asked this witness if he went over it in a hand car. Further than that, I object to it on the ground that this witness would not be enlightened upon that subject, and add in that connection that he was examined with reference to traveling on the railroad, and his answer was that he only had traveled over the road as a passenger, as his business or pleasure called him. For that reason I think that he is not fit to give an opinion upon the subject. I object to it on the other grounds as well.

By the COURT: I understand that it is claimed on the part of the plaintiffs that at a particular point about five miles from Hawgood there was a defect in the road, and it is claimed by the plaintiffs that this is the point where this accident occurred. It was the defect there that occasioned this accident, and the defendant comes in and undertakes to show that it was a different point. I think it is properly rebuttal in view of this condition. But so far as the other objection that the witness has not shown himself competent, I think that must be overruled upon the ground that it would be for the jury to say as to the credence or weight to be given to his testimony. They have heard all of it.

Mr. WILLIAMS: I take an exception.

Question read.

A. No, sir; I didn't.

Q. Do you remember a cut at or about that line (illustrating) between sections 5 and 8, north of Market Lake, about this point on that straight point there?

A. Not that I know of.

125 Q. Do you remember a cut upon that tangent running through sections 5 and 8, on this straight track here?

A. Yes, sir.

Q. Where is it?

A. I can give you the location as nearly as possible. There is about this place what we call the sand point, and this here the reverse curve; there is a cut where it goes through the sand point right here—runs around the sand point and starts on a tangent along here; there is a pull through a sand cut of about 150 yards—I should judge about that; then you go through another small rock cut, and further on, I don't remember of another cut until after we had passed this curve.

Q. After you pass that curve, I understand there is another small cut in the northeast corner of section 8?

A. Yes, sir.

Q. Now, was there any specially bad joint at or about that cut on the day following the wreck?

Mr. WILLIAMS: I object to that on the same ground; that is not rebuttal.

By the COURT: Objection overruled. Exception.

A. No, sir.

By the COURT: How early next morning did you pass over this ground? For what purpose did you pass over this track on the succeeding day?

A. On the next morning I went out to the wreck.

Q. Well, did you pass over it more than once that day?

A. No, sir, I didn't; yes, I did, too, but it was night; I passed on the returning wrecking train into Market Lake.

Q. For what purpose were you accustomed to pass over that track from day to day?

Mr. WILLIAMS: I object to that, if your honor please.

Objection sustained.

Cross-examination:

Q. You say, Mr. Lloyd, that there was no bad joint at this place indicated, the next day, or that you didn't observe any?

A. I didn't observe any.

Q. When you went out in the morning you went out early—before daylight at that time of the year?

126 A. Well, no; it wasn't before daylight.

Q. Or about that time—it was early in the morning—and you walked over, as I understand?

A. Yes, sir.

Q. Walked all the way to the wreck?

A. Not quite all the way.

Q. How far did you walk before you reached the place?

A. Walked to within about three-fourths of a mile of the wreck.

Q. Before you came in sight of it?

A. Yes, sir.

Q. Going home you got on the evening train to Market Lake. About what time did you arrive at Market Lake?

A. I don't know.

Q. Where were you riding when you were going home on that train?

A. That I don't know.

Q. How many cars were there?

A. I don't remember that.

Q. Was it a caboose?

A. I think it was.

Q. Did you ride in the caboose on your return?

A. I think so.

Q. In the morning when you went out your main object in view was to get to the place of the wreck? And in going home at night in the car what was your principal object—in getting home?

A. Yes, sir.

Q. You had got through with your day's work?

A. Yes, sir.

The above and foregoing is all the evidence given to the jury upon the said trial.

At the close of the said evidence and after the argument thereof to the jury by the counsel of the respective parties the court gave the jury the following instructions at the request of the said plaintiffs, to wit:

First.

127 The jury are instructed that the preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact or state of facts.

In determining upon which side the preponderance of the evidence is the jury should take into consideration the opportunities of the several witness- for seeing or knowing the things about which they testify, their conduct and demeanor while testifying, their interest or lack of interest, if any, in the result of the suit, the probability or improbability of the truth of their several statements in view of all the other evidence, facts, and circumstances proved on the trial, and from all these circumstances determine upon which side is the weight or preponderance of the evidence.

Given. J. B. HAYS, *Judge.*

Second.

The jury are instructed that if they believe from the preponderance of the evidence that Conductor Farrell left a message with the operator at Camas reporting the bad place in the road where the accident to the passenger train occurred, and that the said operator was an employé of the defendant in this accident, and that the said operator carelessly and negligently failed to make Flanders, the conductor of the passenger train that was wrecked, acquainted with the

dangerous condition of the road where the accident occurred, and that by reason of the defect in said track the passenger train was wrecked and in said wreck Wm. O. Palmer was killed, and that such killing was without negligence on his part, then the jury should find for the plaintiff in this action and assess the damages at such sum as, under all the circumstances disclosed in this case, may be just, not exceeding the sum of forty thousand dollars.

Given. J. B. HAYS, *Judge.*

Third.

If the jury find from the preponderance of the evidence that the train upon which Palmer was riding was thrown from the track and wrecked by reason of a broken rail upon said track, and that the agents or servants of the defendant knew of it in time to avoid it or that by the exercise of reasonable diligence they might have so known that said rail was broken, then the wrecking of said train was in consequence of the carelessness and neglect of the said
128 defendant, and if Wm. O. Palmer was killed thereby, without negligence on his part, the jury should find for the plaintiffs in this action.

Given. J. B. HAYS, *Judge.*

Fourth.

The court instructs the jury that it is not enough for the plaintiffs to show that they have sustained an injury under circumstances which may lead to a suspicion that there may have been negligence on the part of the defendant, but they should go further and give evidence of the specific act of negligence alleged in their complaint which constitutes their cause of action, but it is only necessary to prove by a preponderance of the evidence the truth of their allegations, and if, in weighing all the evidence, the jury find that the preponderance of the testimony shows that Farrell discovered the broken rail and reported it, that no effort was made to repair it and Flanders was not warned of the danger, then this proof establishes for the purposes of this case the negligence charged against defendant.

Given. J. B. HAYS, *Judge.*

At the request of the said defendant the court further instructed the jury as follows, to wit:

(Title of Court and Cause.)

First.

The court instructs you that it is not enough for the plaintiffs to show that they have sustained an injury under circumstances which may lead to a suspicion or even a fair inference that there may have been negligence on the part of the defendant, but they must go fur-

ther and give evidence of the specific act of negligence alleged in their complaint and which constitutes their cause of action.

Given. J. B. HAYS, *Judge.*

Second.

The court instructs you, gentlemen of the jury, that the plaintiffs are bound to make out and show the existence of the
129 facts alleged in their complaint and constituting their cause of action by a preponderance of the testimony to entitle them to recover.

By a preponderance of the evidence is meant that state of the case which you think, from the evidence adduced, is most likely and is supported by the greater weight of evidence.

If you should fail to find, by the preponderance of the evidence, that the defendant was guilty of negligence in the particulars alleged in the complaint, then the plaintiff cannot recover.

Given. J. B. HAYS, *Judge.*

Third.

In this case the negligence alleged by the plaintiffs, and which constitutes their cause of action, is that the car in which the deceased was riding was thrown off the track and overturned by reason of a broken rail which the defendant carelessly and negligently permitted to remain on the track, and thereby the injury complained of was caused. To entitle the plaintiff- to recover they must prove the existence of these facts and that they were the cause which produced the injury complained of by a preponderance of the evidence.

Given. J. B. HAYS, *Judge.*

Fourth.

Negligence is the failure to do what a reasonable and prudent person would have done under the circumstances of the particular case or doing what such a person under the existing circumstances would not have done; and, on the contrary, diligence is doing or omitting to do what such a person would do or omit to do in the same circumstances.

If, therefore, the jury find, from the preponderance of the evidence in this case, that the car in which the deceased was riding was thrown from the track by reason of a broken rail, still you cannot find for the plaintiffs unless you further find, from the preponderance of the evidence, that the agents or servants of the defendant knew of the existence of such broken rail in time to avoid the accident, or could, by the exercise of reasonable diligence, have ascertained that fact in time to have prevented such accident.

Given. J. B. HAYS, *Judge.*

Fifth.

If the jury find, from the evidence in this case, that the
130 deceased, William O. Palmer, at the time of his death was an employé of the defendant company and was engaged in and about the business of his employment at the time, then his rights as against the defendant for the alleged negligent injury are to be determined by the law applicable to such relation, except as it may be controlled by any special agreement or understanding between them.

Given. J. B. HAYS, *Judge.*

Sixth.

A party entering into the employment of another takes upon himself the usual and ordinary risks of such an employment, be it extra hazardous or not.

Given. J. B. HAYS, *Judge.*

Seventh.

In this action the measure of damages is not the loss or suffering of the deceased, but the injury, resulting from his death, to the plaintiffs. In other words, the object of the statute allowing the action to be maintained is compensation for the pecuniary loss suffered by the plaintiffs on account of the death of William O. Palmer, and the sympathy, distress, or injured feelings of the plaintiffs or other relations are not to be taken into consideration in fixing the amount of damages. This damage is the sum which the deceased would probably have realized from his labor or business during his life for the benefit of these plaintiffs, taking into consideration the age, health, habits, industry, ability, and manner of life of the deceased, and also the reasonable and probable expenditures he would have made for himself individually.

Given. J. B. HAYS, *Judge.*

The foregoing are all the instructions given by the court to the said jury.

The said defendant also requested the court to further instruct the jury as follows, viz:

First.

The general rule of law is that when a servant, in the execution of his master's business, receives an injury which befalls him
131 from one of the risks incident to the business he cannot hold the master responsible, but must bear the consequences himself. The reason generally given for the rule is that the servant, when he engages in an employment, does so in view of the incidental hazards that reasonably pertain to the particular business engaged in. He knows that he will be exposed to the incidental

risks, and he must be supposed to have contracted that between himself and his master he would run those risks.

Refused as not applicable to the facts in this case.

J. B. HAYS, *Judge.*

Second.

If the jury find from the evidence that the contract by which the deceased was to work for the defendant upon its road included his transportation upon the road and in the cars of the defendant from one point to another thereon, as his duties required, and that he was furnished such transportation in pursuance of such contract, and if you further find from the evidence that the deceased at the time of his death was traveling in pursuance of such contract and in the performance of his duties as such employé of the defendant, then he was not a passenger at the time of the happening of the accident which caused his death.

Refused. J. B. HAYS, *Judge.*

Third.

The deceased, William O. Palmer, and the operator at Camas station were fellow-servants engaged in the same common employment of this defendant, and if the jury find from the evidence that the death of the said Palmer was the result of the negligence of the said operator in not communicating the report made by the conductor Farrell to the conductor of the train on which the deceased was riding at the time of the accident, your verdict should be for the defendant.

Refused. J. B. HAYS, *Judge.*

But the court refused to give the said jury the said instructions so requested by the defendant or either of them.

After the conclusion of the charge and the jury had retired to consider of their verdict the defendant, by its counsel, in open
132 court took an exception to each of the instructions and to each and every part of each of said instructions so given to the jury at the request of the plaintiffs, and also at said time took an exception as to the refusal of the court to give each of the said instructions requested by the defendant and refused by the court.

The counsel of plaintiffs were present at the said time and then and there objected to the said exceptions being taken to said charges and refusals to charge on the ground that they were too late, being taken after the jury had retired as aforesaid.

On the 25th day of May, 1887, the said jury returned a verdict for the plaintiffs in the sum of $16,702.85, and on the same day judgment was entered in due form thereon in favor of the said plaintiffs and against the said defendant for the said sum and costs, taxed at $221.50.

And afterwards, to wit, on the said 25th day of May, 1887, upon the application of the said defendant, the said court extended the

time until the 15th day of June, 1887, in which the said defendant might prepare and serve its statement and other papers to be used upon its motion for a new trial.

The said defendant now assigns the following errors and grounds for a new trial, to wit:

First.

Abuse of discretion by the court in refusing to allow the defendant to amend its answer, as asked, whereby the defendant was prevented from having a fair trial.

Second.

Excessive damages appearing to have been given under the influence of passion or prejudice.

Third.

Insufficiency of the evidence to justify the verdict, in this, to wit:

a. The evidence fails to show any fault or negligence on the part of the defendant causing or tending to cause the injury complained of, or any negligence whatever.

b. It fails to show the negligence on the part of the defendant alleged in the complaint, viz., that the defendant permitted
133 a broken rail to remain on the track, thereby causing the injury alleged.

d. It fails to show that the deceased, William O. Palmer, was a passenger, as alleged in the complaint.

e. The evidence does show that the defendant exercised due care and diligence in the premises.

f. It further shows that the accident which caused the death of the deceased was one that could not, with reasonable and ordinary care and diligence, be anticipated or prevented, but that it was unavoidable.

Fourth.

The said verdict is against law, to wit: The jury, in finding a verdict for the plaintiff and in the amount returned, disregarded and disobeyed the aforesaid instructions given them by the court, and especially the request of the defendant.

Fifth.

Error in law occur-ing at the trial and excepted to by the defendant, as follows, viz:

a. The court erred in overruling and denying the defendant's application to amend its answer herein, which was made and submitted to the court, as herein shown, before the trial was begun.

b. The court erred in denying the application of the defendant to

amend its said answer when the same was renewed *and* during the progress of the said trial, as shown in this statement.

c. The court erred in overruling the defendant's motion for a nonsuit.

d. The court erred in sustaining the plaintiffs' objections to the questions propounded to the witness Milton Russell by the defendant on his direct examination, and which it did sustain, and in sustaining each of them.

e. The court erred in overruling each and every objection made by the defendant to the questions put by the plaintiffs to the witness E. Fanning on cross-examination.

f. Erred in sustaining each and every of the objections made by the plaintiffs to the questions put to the witness G. W. Barraclough on his direct examination when called as a witness for the defendant.

134 *g.* Erred in sustaining the plaintiffs' objection to receiving in evidence the pass identified by the witness Barraclough and offered in evidence by the defendant.

h. Erred in sustaining each and every of the objections made by the plaintiffs to the questions put to the witness J. M. Bennett on his direct examination.

i. Erred in overruling the several objections made by the defendant to the questions put to the witness B. T. Lloyd on his direct examination when called as a witness for the plaintiffs upon the rebuttal.

j. The court erred in giving each of the instructions to the jury which it did give at the instance and request of the plaintiffs, as herein set forth.

k. Erred in refusing to give each of the several instructions which it did refuse to give and which were asked by the defendant.

P. L. WILLIAMS,
HOMER STULL,
Attorneys for Defendant.

Dated June 13th, 1887.

Certificate of Judge.

TERRITORY OF IDAHO, } ss:
Bingham County, }

I hereby certify that the proposed statement of the defendant on motion for a new trial herein and the plaintiffs' proposed amendments thereto came on this day for settlement by the court, and counsel for the plaintiffs renewed their objections to the exceptions taken to the charges of the court to the jury in the said case and to its refusals to charge on the grounds above stated, and after argument by the respective counsel and due consideration the court ordered that the above exceptions, with the objections of plaintiffs' counsel thereto, be incorporated into the statement on motion for a new trial, together with the statement as to the time when they were

made. I further certify that the above and foregoing statement is true and correct, and is hereby allowed.

Witness my signature this second day of November, A. D. 1887.

JAMES B. HAYS, *Judge, &c.*

135 Endorsed: Title of court and cause. Statement on motion of the said defendant for a new trial, and to be used as and constitute a statement on appeal from the final judgment in the said action. Filed June 18th, 1887. S. H. Hays, clerk, by F. H. Bixby, deputy. Refiled November 2nd, 1887. S. H. Hays, clerk.

The argument upon the foregoing defendant's motion for a new trial having been heard, the following order on said motion was on November 2nd, 1887, made and entered of record, to wit:

(Title of Cause.)

Now comes the plaintiff- herein and objects to the allowance of certain exceptions taken in the statement herein, and the court, being advised concerning the same, settled said statement.

And now, on this day, the motion of the defendant herein for a new trial having been duly considered by the court, it is considered that the verdict herein is excessive; and now come the plaintiffs herein and enter their remission of so much of the verdict and judgment hereinbefore entered as is in excess of ten thousand dollars; and it is ordered that said remission be entered upon the judgment docket of this court.

And the said plaintiffs, by their counsel, having remitted such excess and filed the same in writing, it is now here ordered and adjudged that the said motion of defendant for a new trial be, and the same is hereby, overruled and denied; to which ruling and order defendant then and there excepted.

And now comes the defendant and moves to retax the costs herein, and, after consideration of the same, it is ordered that the said motion be granted, and the costs were accordingly retaxed.

JAMES B. HAYS, *Judge.*

136 On December 9th the following execution was issued at the request of the plaintiffs' attorneys, viz:

"*Execution.*"

In the District Court of the Third Judicial District, County of Bingham, Territory of Idaho.

The People of the United States in the Territory of Idaho to the sheriff of Bingham county, Greeting:

Judgment.		Accruing cost.	
Judgment	$10,000 00	Execution and filing	$
Cost	221 35	Levy	
		Advertisement	
		Keeping	
Total	$10,221 35	Total	$

Whereas, on the 26th day of May, 1887, Linnie M. Palmer and A. M. Palmer, by W. F. Fisher, his guardian *ad litem*, as plaintiffs, recovered judgment in the said district court, in the said county of Bingham, against the Utah and Northern Railway Company for the sum of ten thousand dollars, with interest at the rate of ten per cent. per annum till paid, together with $221.35, costs and disbursements at the date of said judgment and accruing costs, as appear to us on record;

And whereas the judgment-roll in the action in which said judgment was entered is filed in the clerk's office of said court, in the county of Bingham, and the said judgment was docketed in said clerk's office, in said county, on the day and year first above written;

And the sum of ten thousand dollars, with interest thereon, is now (at the date of this writ) actually due on said judgment:

Now, therefore, you, the said sheriff, are hereby required to make the said sums due on said judgment, with interest as aforesaid, and costs and accruing costs, to satisfy said judgment in full out of the personal property of said debtor; or if sufficient personal property of said debtor cannot be found, then out of the real property in your county belonging to him on the day whereon said judgment was docketed in the said county, or any time thereafter; and make
137 return of this writ within sixty days after your receipt hereof, with what you have done endorsed thereon.

Witness Hon. James B. Hays, judge of the said district court, at the court-house, in the county of Bingham, this 9th day of December, 1887.

Attest my hand and the seal of said court the day and year last above written.

[SEAL.] S. H. HAYS, *Clerk.*

The return of said sheriff is as follows, to wit:

Third Judicial District.

TERRITORY OF IDAHO, } ss:
County of Bingham, }

I hereby certify that I received the within execution on the 10th day of December, 1887, and served the same on the 10th day of December by levying on the following: All credits and all other personal property in the hands or under the control of the agent of the U. P. R'y Co. at Blackfoot and all property in the hands or under the control of the agent of said company at Eagle Rock, Bingham county, Idaho. Received no statement.

S. F. TAYLOR, *Sheriff.*

Fees, $7.80.

Endorsed: Title of court and cause. Execution. Judgment, $—; costs, $—; execution, $—; levy, $—; advertisement, $—; keeping, $—. Filed December 14th, 1887. S. H. Hays, clerk of district court.

(Title of Court and Cause.)

Notice of Appeal.

Please take notice that the said defendant in the above-entitled action hereby appeals to the supreme court of the Territory of Idaho from the judgment therein rendered and entered in the said district court at the May term thereof, 1887, to wit, on the 25th day of May, 1887, in favor of the said plaintiffs and against the said defendant
138 for the sum of sixteen thousand seven hundred and two and $\frac{85}{100}$ dollars damages, together with costs, and which judgment was afterwards, at the October term of said court, 1887, to wit, on the 2nd day of November, 1887, reduced to the sum of ten thousand dollars damages, and from the whole thereof; and you will further take notice that the said defendant hereby also appeals from the order of said court made and entered in said action at the October term thereof, 1887, to wit, on the 2nd day of November, 1887, denying and overruling the said defendant's motion for a new trial and refusing to grant a new trial in said action, and from the whole of said order.

P. L. WILLIAMS,
W. H. SAVIDGE,
Attorneys for Defendant.

To the clerk of said district court and to Messrs. H. W. Smith, H. M. Bennett, and Jas. H. Hawley, attorneys for plaintiffs.

Endorsed: Title of court and cause. Notice of appeal. Copy of the within notice received this 13th day of December, 1887. Smith & Wright, H. M. Bennett, J. H. Hawley, attorneys for plaintiffs. Filed December 13th, 1887. S. H. Hays, clerk.

TERRITORY OF IDAHO, }
County of Bingham, } *ss:*

Certificate of Clerk.

I, S. H. Hays, clerk of the third district court of Idaho Territory, do hereby certify that the above and foregoing are full and true copies of the papers comprising the judgment-roll in the above-entitled action, of the statement on motion for a new trial, of the order denying said motion, of the notice of appeal, and of the whole thereof; and I further certify that an undertaking on appeal in due form has been properly filed.

Attest my hand and the seal of the said third district court of Idaho Territory this 30th day of December, A. D. 1887.

[SEAL.] S. H. HAYS, *Clerk.*

139 *Journal Entries.*

In the Supreme Court of Idaho Territory. January Term, A. D. 1888.

Present: Hon. James B. Hays, chief justice; Hon. Norman Buck, Hon. Case Broderick, asso. justices.

TUESDAY, *January* 24.

LINNIE M. PALMER *et al.*, Respondents,
vs.
THE UTAH & NORTHERN RAILWAY COMPANY, Appellant. } No. 23.

Ordered that this cause be set for hearing on the 27th inst.

MONDAY, *January 30th.*

LINNIE M. PALMER *et al.*, Pl't'fs & Respondents,
vs.
THE UTAH & NORTHERN R'Y COMPANY, Def't & Appellant. } No. 23.

140 Now, on this day, this cause came regularly on to be heard, P. L. Williams, Esqr., appearing as counsel for appellant and James H. Hawley & Ransford Smith, Esqrs., for respondents.

P. L. Williams, Esqr., opened the argument to the court on behalf of appellant, followed by Ransford Smith and James H. Hawley, Esqrs., on behalf of respondents.

P. L. Williams, Esqr., then closed the argument on behalf of appellant and said cause was submitted and taken under advisement by the court.

WEDNESDAY, *February 8th*, 1888.

LINNIE M. PALMER & ALFRED MERLE PALMER, by WM. F. FISHER, Guardian *ad Litem*, Plaintiffs & Respondents,
vs.
THE UTAH & NORTHERN RAILWAY COMPANY, Defendant & Appellant. } No. 23. On Appeal from the District Court of the Third Judicial District in and for Bingham County.

And now, at this day, this cause being called and having been heretofore submitted and taken under advisement by the
141 court and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by Associate Justice Buck to the effect that the judgment of the court below be affirmed.

Whereupon it is now considered, ordered, adjudged, and decreed by the court here that the judgment of the district court of the third judicial district in and for the said county of Bingham in the above-entitled cause be, and the same is hereby, affirmed.

LINNIE M. PALMER and ALFRED MERLE PALMER, by WM. F. FISHER, Guardian *ad Litem*, Plaintiffs & Respondents,
vs.
THE UTAH & NORTHERN RAILWAY COMPANY, Defendant & Appellant.
} No. 23.

Now came J. T. Morgan, Esqr., and on behalf of appellant
142 moved the court for a stay of proceedings herein for a period of thirty days from this date. Motion sustained and so ordered. And moved the court to fix the amount of bond to operate as a supersedeas bond on writ of error to the Supreme Court of the United States in said cause; which motion was taken under advisement by the court.

FRIDAY, *February* 17*th*, 1888.

LINNIE M. PALMER and ALFRED MERLE PALMER, by WM. F. FISHER, Guardian *ad Litem*, Plaintiffs & Respondents,
vs.
THE UTAH & NORTHERN RAILWAY COMPANY, Defendant & Appellant.
} No. 23.

On this day the court ordered that the bond on writ of error to the Supreme Court of the United States to operate as a supersedeas bond in this cause be, and the same is hereby, fixed at the sum of ($15,000) fifteen thousand dollars.

143 *Opinion.*

In Supreme Court, Idaho Territory. January Term, 1888.

Appeal from Bingham Co. 3d judicial district.

LINNIE M. PALMER and ALFRED MERLE PALMER, by W. F. FISHER, His Guardian *ad Litem*, Plaintiffs and Respondents,
vs.
THE UTAH AND NORTHERN RAILWAY Co., Defendant & Appellant.

P. L. Williams & W. H. Savidge, att'ys for appellant; Smith & Wright, H. M. Bennett, & James H. Hawley, att'ys for respondents.

The decision of the appellate court upon any matter properly before it on the record becomes the law of the case in all subsequent proceedings therein.

A railroad company cannot avoid the responsibility of operating its road by allowing others to have the control and management of its road-bed or trains without the consent of the power whence it derives its franchises.

144 *Opinion by Buck, Justice; Hays, C. J., and Broderick, J., Concurring.*

This is an action brought by the plaintiffs to recover damages for the death of William O. Palmer, alleged to have been killed in Bingham county on the 11th day of December, A. D. 1885, through the negligence of the defendant in operating the train upon which deceased was riding at the time of his death.

The cause was first tried in 1886, and on appeal to this court a new trial was granted. It was tried a second time, at the May term, 1887, and verdict rendered for the plaintiffs for damages in the sum of $16,702.85 and costs, which was reduced to $10,000 by the court as a condition upon which the motion for a new trial was overruled.

It now comes upon appeal from the order overruling defendant's motion for a new trial for errors occurring on the second trial.

The appellant assigns six errors in his brief, upon which he relies:

145 1st.

In overruling defendant's demurrer to the second amended complaint.

2.

The refusal of the court to allow the defendant to amend its answer.

3.

Excessive damages appearing to have been given under the influence of passion or prejudice.

4.

Insufficiency of the evidence to justify the verdict.

5.

That the verdict was against law.

6.

Errors in law occurring at the trial and specified in the assignment of errors.

The order of the court in overruling the defendant's demurrer to the second amended complaint was considered on the former appeal of this case, reported in 13 Pacific R., 425, and sustained, and the ruling thereon becomes the law of this case.

Hayne on New Trial (2 vol. in one), sec. 291.
Phelan *vs.* San Francisco, 20 Cal., 40.
Davidson *vs.* Dallas, 15 " 82.
Ex parte Sibbald, 12 Peters, 491.
Washington Bridge Co. *vs.* Steward, 3 Howard, 413.
146 Supervisors *vs.* Kennicott, 4 Otto, 498.
The Lady Pike, 6 " 462.

The second error assigned is the overruling of defendant's motion to amend his answer after a new trial had been granted.

Amendments to pleadings rest largely in the discretion of the court, and rulings thereon by the trial court will not be disturbed on appeal except it appear that the exercise of such discretion has deprived the party complaining of some substantial right.

It has been held that such amendments should not be allowed after a new trial has been granted.

Bliss' Code Pleading, sec. 430.
Spanagel *vs.* Reay *et al.*, 49 Cal., 608.

Nor when the amendment offered denies matters before admitted by the pleadings to be true.

Bliss on Code Pleading, 430.
Harrison's Administrators *vs.* Hastings, 48 Nev., 346.

The complaint alleges that the defendant owned and operated its railroad and was a common carrier of passengers at the time
147 the deceased was killed. This was not denied in the answer, and was therefore admitted and taken as true upon the first trial. The amended answer refused by the court denies that the defendant was operating said road or was a common carrier of passengers, and alleges that said road and trains upon it were operated by another company, to wit, the Union Pacific Railway Company.

The refusal of the court to allow the amendment is clearly sustained by the authorities above cited.

An inspection of the proposed amended answer, however, sustains the ruling of the court upon the additional ground that it set up no defense to the action. Whether it was intended to set up matter in avoidance of facts alleged in the complaint and not denied in the answer or to deny such facts and to set up a new defense is not clear.

The purpose seems to have been to set up new matter, which would shift the responsibility of operating the defendant's
148 road from the defendant to the Union Pacific Railway Company, who are alleged therein to have been in the exclusive possession of defendant's road and the owner of and operating the train upon which deceased was riding at the time of the accident resulting in his death.

The amended answer does not explain the relation existing between defendant and the Union Pacific road. It simply alleges that said U. P. R. R. was at the time & since in exclusive possession of its roads and operating its trains. All that is set up in the said amended answer might be true & yet the U. P. R. R. be but the employé of defendant.

In either event we think the defendant could not so shift the responsibility of operating the road without the consent of the power whence it obtained its franchises, and as no such consent was alleged

the proposed amended answer set up no defense to the action, and the motion to file the same was properly denied.

149 Babbatt, administratrix, etc., *vs.* The Johnstown, Gloversville and Kingsboro Horse R. R. Co., etc., 80 New York, 27.
Macon & Augusta R. R. *vs.* Mayes (49 Georgia), 15 Amer. R., 672.
Railroad Co. *vs.* Brown, 17 Wall., 445.
2 Rover on Railroads, p. 1115, sec. 22.

The third point made by appellant is that the damages allowed by the jury were excessive, appearing to have been given under the influence of passion and prejudice.

Our Code, section 142, provides that in actions of this nature—

"Such damages may be given as under all the circumstances of the case may be just."

The fourth alleged error urged by appellant is that the evidence is insufficient to sustain the verdict. An examination of the evidence fails to convince the court that either the third or fourth assignment of error is well taken.

The fifth error assigned by appellant is that the verdict is against law, and the sixth, errors of the court occurring on the trial.

It is urged under these two points that the jury disre-
150 garded the instructions of the court in finding the damages given the plaintiff, and that the court erred on its ruling as to the admission of evidence and as to the amendments of the pleadings. The ruling as to the pleadings we have already considered. We have carefully examined the instructions of the court and the ruling as to the admission of evidence and find no error. No error appearing in the record, the judgment is affirmed.

151 *Assignment of Errors and Prayer for Reversal.*

In the Supreme Court of the United States.

THE UTAH AND NORTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
LINNIE M. PALMER and ALFRED MERLE PALMER, by WILLIAM F. FISHER, His Guardian *ad Litem*, Defendants in Error.
} Assignment of Errors.

The said plaintiff in error assigns as error that the damages given by the jury in said case were excessive and appear to have been given under the influence of passion and prejudice, and the said supreme court of the Territory of Idaho erred in sustaining the decision and judgment of the said district court of the third judicial district of said Territory, holding to the contrary thereof, and that the said judgment was not excessive.

Second. The said supreme court erred in sustaining the
152 decision of the said district court in overruling and denying the application of plaintiff in error (the defendant in said

district court) to amend its answer herein, which was made and submitted to the court, as shown in the record herein, before the trial of said cause was begun in said district court.

Third. The said supreme court also erred in sustaining the action and ruling of said district court in refusing to allow the said amendment of the said answer when the same was renewed during the progress of the said trial in said district court.

Fourth. Said supreme court erred in sustaining the decision and ruling of the said district court in overruling the motion of plaintiff in error (defendant in said district court) for a judgment of nonsuit against the said defendants in error (plaintiffs in said district court).

Fifth. The said supreme court erred in sustaining the decision and ruling of the said district court in sustaining the objec-
153 tions of the defendants in error (the plaintiffs in said district court) to the several questions propounded to the witness Milton Russell by the plaintiff in error (the defendant in said district court) on the direct examination of said witness and in sustaining each and every of the said rulings.

Sixth. The said supreme court erred in sustaining the action of the said district court in overruling each and every objection made by the plaintiff in error (the defendant in said district court) to the questions put by the defendants in error (the plaintiffs in said district court) to the witness E. Fanning on cross-examination.

Seventh. The said supreme court erred in sustaining the ruling and action of the said district court in sustaining each and every of the objections made by the defendants in error (plaintiffs in said district court) to the questions put to the witness G. W. Barraclough on his direct examination when called as a witness for the plaintiff in error (defendant in said district court).

154 Eighth. The said supreme court erred in sustaining the ruling and action of the said district court in sustaining the objections of defendants in error (plaintiffs in said district court) to receiving in evidence the pass identified by the witness Barraclough and offered in evidence by the plaintiff in error (the defendant in said district court).

Ninth. The said supreme court erred in sustaining the action and ruling of the said district court in sustaining each and every of the objections made by the defendants in error (the plaintiffs in said district court) to the questions put to the witness J. M. Bennett on his direct examination.

Tenth. The said supreme court erred in sustaining the action and ruling of the said district court in overruling each and every of the objections made by the plaintiff in error (the defendant in said district court) to the questions put to the witness B. T. Lloyd on his direct examination when called as a witness for the defendants in error (the plaintiffs in said district court) upon the rebuttal.

155 Eleventh. The said supreme court erred in sustaining the action and ruling of the said district court in giving each of the instructions to the jury which it did give at the instance and request of the defendants in error (the plaintiffs in said district

court) and numbered "second" and "third" respectively, and which are in the following form, to wit: "Second." "The jury are instructed that if they believe from the preponderance of the evidence that conductor Farrell left a message with the operator at Camas, reporting the bad place in the road where the accident to the passenger train occurred, and that the said operator was an employé of the defendant in this accident, and that the said operator carelessly and negligently failed to make Flanders, the conductor of the passenger train that was wrecked, acquainted with the dangerous condition of the road where the accident occurred, and that by reason of the defect in said track the passenger train was wrecked and in said wreck William O. Palmer was killed,
156 and that said killing was without negligence on his part, then the jury should find for the plaintiffs in this action and assess the damages at such sum as, under all the circumstances disclosed in this case, may be just, not exceeding the sum of forty thousand dollars." "Third." "If the jury find from the preponderance of the evidence that the train upon which Palmer was riding was thrown from the track and wrecked by reason of a broken rail upon the said track, and that the agents or servants of the defendant knew of it in time to avoid it, or that by the exercise of reasonable diligence they might have so known that said rail was broken, then the wrecking of said train was in consequence of the carelessness and neglect of the said defendant, and if William O. Palmer was killed thereby, without negligence on his part, the jury should find for the plaintiffs in this action."

Twelfth. The said supreme court erred in sustaining the
157 action and ruling of said district court in refusing to give each of the several instructions which it did refuse to give which were asked by the plaintiff in error (the defendant in said district court) and numbered "first," "second," and "third" respectively, and which were so requested in the following form, to wit:

"First." "The general rule of law is that when a servant in the execution of his master's business receives an injury which befalls him from one of the risks incident to the business he cannot hold the master responsible, but must bear the consequences himself. The reason generally given for the rule is that the servant when he engages in the employment does so in view of the incidental hazards that reasonably pertain to the particular business engaged in. He knows that he will be exposed to the incidental risks, and he must be supposed to have contracted that between himself and his master he would run those risks."

"Second." "If the jury find from the evidence that the contract by which the deceased was to work for the defendant upon
158 its road included his transportation upon the road and in the cars of defendant from one point to another thereon as his duties required, and that he was furnished such transportation in pursuance of such contract, and if you further find from the evidence that the deceased at the time of his death was traveling in pursuance of such contract and in the performance of his duties as

such employé of the defendant, then he was not a passenger at the time of the happening of the accident which caused his death."

"Third." "The deceased, William O. Palmer, and the operator at Camas station were fellow-servants engaged in the same common employment of this defendant, and if the jury find from the evidence that the death of the said Palmer was the result of the negligence of the said operator in not communicating the report made by the conductor Farrell to the conductor of the train in
159 which the deceased was riding at the time of the accident, your verdict should be for the defendant."

Thirteenth. The said supreme court erred in affirming the judgment of said district court.

Wherefore, and in consideration of the said errors, the plaintiff in error prays this court for a judgment of reversal of the said judgment and decision of the said supreme court of Idaho Territory, and that the said cause be remanded, with the direction that such further action and proceedings be taken therein as may be in accordance with law.

P. L. WILLIAMS,
Attorney for the Plaintiff in Error.

160 Endorsed: Supreme Court of the United States. Utah & Northern R'y Co., pl'ff in error, *vs.* Linnie M. Palmer *et al.*, def'ts in error. Assignment of errors and prayer for reversal. Filed Feb. 23d, 1888. A. L. Richardson, clerk.

161 *Supersedeas Bond.*

Know all men by these presents that we, John Lemp, B. M. Eastman, and W. H. Ridenbaugh, *both* of Ada county, Territory of Idaho, are held and firmly bound unto Linnie M. Palmer and Alfred Merle Palmer in the full and just sum of fifteen ($15,000) thousand dollars, to be paid to the said Linnie M. Palmer and Alfred Merle Palmer and to their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 23d day of February, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately, at a term of the supreme court of the Territory of Idaho, in an action pending in said court on appeal from the district court for the third judicial district of said Territory in and for Bingham county, a judgment in favor of the said Linnie M. Palmer and Alfred Merle Palmer, by his guardian, William F. Fisher,
162 the plaintiffs therein, and against The Utah and Northern Railway Company, a corporation, the defendant, rendered and entered in said district court, was affirmed by said supreme court, and the said Utah and Northern Railway Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment, and a citation to the

said Linnie M. Palmer and Alfred Merle Palmer, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington, District of Columbia, on the second Monday of October, A. D. 1888:

Now, the condition of the above obligation is such that if the said Utah and Northern Railway Company shall prosecute its said writ of error to effect and answer all damages and costs if it fail to make its appeal good, then the above obligation to be void; else to remain in full force and virtue.

B. M. EASTMAN. [SEAL.]
W. H. RIDENBAUGH. [SEAL.]
JOHN LEMP. [SEAL.]

Signed, sealed, and delivered in presence of—
A. L. RICHARDSON.

163 TERRITORY OF IDAHO, } ss:
County of Ada, }

John Lemp, B. M. Eastman, and W. H. Ridenbaugh, the sureties whose names are subscribed to the foregoing undertaking, being severally duly sworn, each for himself says that he is a resident and householder within said county and Territory; that he is worth the amount stated in the said undertaking as the penalty thereof over and above all his debts and liabilities, exclusive of property exempt from execution.

JOHN LEMP.
B. M. EASTMAN.
W. H. RIDENBAUGH.

Subscribed and sworn to before me this 23d day of Feb., 1888.
[SEAL.] A. L. RICHARDSON,
Clerk Sup. Court of Idaho.

(Endorsed:) Supersedeas bond. I hereby approve of the within bond as to form and sufficiency for the uses and purposes therein mentioned. Dated Feb. 23d, 1888. James B. Hays, chief justice, Idaho Ter. Filed Feb. 23d, 1888. A. L. Richardson, clerk.

164 UNITED STATES OF AMERICA, } ss:
Territory of Idaho, }

I, A. L. Richardson, clerk of the supreme court of Idaho Territory, hereby certify that the foregoing contains a true copy of the record and proceedings in the case of Linnie M. Palmer & Alfred Merle Palmer, by William F. Fisher, his guardian *ad litem*, plaintiffs and respondents in said court (and defendants in error in the Supreme Court of the United States), against The Utah & Northern Railway Company, defendant and appellant in the supreme court of Idaho and plaintiff in error in the Supreme Court of the United States,

lately decided in said supreme court of Idaho Territory, and of the whole thereof.

Seal Supreme Court, Idaho Territory.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Boisé City, in said Territory, this 2nd day of March, A. D. 1888.

A. L. RICHARDSON, *Clerk*.

Endorsed on cover: Idaho Territory supreme court. No. 354. The Utah and Northern Railway Company, plaintiff in error, *vs.* Linnie M. Palmer & Alfred Merle Palmer, an infant, by Wm. F. Fisher, his guardian *ad litem*. Filed April 19, 1888.